

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
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TRANSCRIPT OF RECORD

United States Court of Appeals for the District of Columbia

OCTOBER TERM, 1934

No. 6367

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SPECIAL CALENDAR

KATHERINE R. SIMPKINS, APPELLANT,

vs.

JAMES H. McDERMOTT.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

FILED DECEMBER 6, 1934.

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United States Court of Appeals for the District of Columbia

No. 6367.

KATHERINE R. SIMPKINS, Appellant,

vs.

JAMES H. McDERMOTT.

1 [Stamp:] Filed Nov. 23, 1933. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

In the Supreme Court of the District of Columbia Holding
a Probate Court.

Administration No. 45,823.

In re: Estate of HUGH McDERMOTT, Deceased.

*Petition of Katherine R. Simpkins, Executrix,
to Probate Will.*

1. The petitioner, Katherine R. Simpkins, is a citizen of the United States, residing in the District of Columbia, and files this petition as the person named as executrix in the last will and testament of Hugh McDermott, deceased.

2. That Hugh McDermott, late a citizen of the United States and a resident of the District of Columbia, departed this life, while on a temporary visit to Prince Georges County, Maryland, testate, on or about November 8, 1933, leaving as his survivors the following named persons, who are his only heirs at law and next of kin, and whose names, residences and relationships are as follows: Maggie McDermott, wife, 1344 G Street, S. E.; Margaret Casper, daughter, 625 Allison Street, N. W.; James H. McDermott, son, 4338 River Road, N. W.; Burndette Monico, 1622 Mas-

sachusetts Avenue, S. E., daughter; Frances May McDermott, daughter, 1344 G Street, S. E.; Edward McDermott, son, 1344 G Street, S. E., who are all of full age.

3. That the said decedent, at the time of his death, was seized and possessed of the following real estate, situate in the District of Columbia, to-wit: Lot 119, square 1043, being a brick row, known as #1344 G Street, S. E., assessed at \$4284.00, and worth about \$7,000.00, on which there is a balance of about \$2,700.00 due the Oriental Building Association on a loan made on the said property.

4. The decedent left personal property valued at \$450.00 as follows: Compensation insurance, U. S. Veterans Bureau.

5. That the decedent left a last will and testament bearing date November 23, 1932, which has been filed with the Register of Wills in the District of Columbia for probate and record, in which said will, the petitioner, Katherine R. Simpkins, was made sole executrix, and as such believes herself entitled to letters testamentary on the said estate.

6. That the decedent, as far as your petitioner, after diligent inquiry, has been able to learn, left debts, including expenses incident to his last illness, funeral expenses
2 and said \$2,700.00 on the real estate, amounting to about \$4,700.00.

Wherefore, the premises considered, petitioner respectfully prays:

1. That process of this Court issue against such heirs at law and next of kin, requiring them to answer the exigency of this petition.

2. That the said will of the decedent, dated November 23, 1933, be admitted to probate and record as a will of real and personal estate, as the last will and testament of Hugh McDermott, deceased.

3. That letters testamentary be granted your petitioner.

4. And such other and further relief as the nature of the case may require, and to the Court may seem just and proper.

KATHERINE R. SIMPKINS,
Executrix.

RAYMOND M. HUDSON,
Attorney for Petitioner,
409-10 Peoples Life Ins. Bldg.

DISTRICT OF COLUMBIA, ss:

I do solemnly swear that I have read the annexed petition by me subscribed and know the contents thereof; and that the statements of facts therein made as upon personal knowledge are true, and those made as upon information and belief, I believe to be true.

KATHERINE R. SIMPKINS,
Executrix.

Subscribed and sworn to before me this 14th day of November, A. D. —

[SEAL.]

AUGUST F. SCHIMMACK,
Notary Public, D. C.

My commission expires April 26, 1936.

(Endorsement:) Petition of Katherine R. Simpkins, Executrix, to probate of Will. Filed Nov. 23, 1933. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

3 The petition of James H. McDermott, respectfully represents to the Court as follows:

1. That he is a citizen of the United States, a resident of the District of Columbia, and is a son of the above named decedent.

2. That he has notice that a certain paper writing bearing date the 23rd day of November, 1932, has been filed in this Honorable Court as the last will and testament of said Hugh McDermott, deceased.

3. That his interest will be injuriously affected by the allowance of said pretended will; that he does hereby contest the probate and validity of said paper writing purporting to be the last will and testament of said Hugh McDermott, deceased, and for that purpose, alleges:

First. The said paper writing is not the last will and testament of said deceased.

Second. The said deceased was not, at the time of the making and subscribing or of the acknowledging by him of the said paper writing, of sound mind and memory or in any respect capable of making a will.

Third. The said deceased did not, at the time of making the subscription at the end of said alleged will or at the

time of acknowledging the same subscription to have been made by him to the attesting witnesses to the said paper writing declare the said paper writing to be the last will and testament of him the said Hugh McDermott.

4 Fourth. The attesting witnesses to said alleged will did not nor did either of them sign his name as a witness to the said alleged will at the request of the said Hugh McDermott.

Fifth. The said paper writing, purporting to be such last will and testament was obtained and the execution thereof procured by fraud and coercion exercised upon him by one Katherine R. Simpkins, or some other person or persons unknown to the subscriber.

Sixth. He alleges that the said paper writing was not freely and voluntarily executed or made as decedent's last will and testament by said deceased, but that the subscription thereto and publication thereof by him was procured by fraud and coercion exercised upon him by Katherine R. Simpkins, or some other person or persons unknown to the subscriber.

Wherefore, the premises considered, your petitioner prays:

1. That process may issue from this Court requiring the parties in interest to answer the exigencies of this petition.

2. That said paper writing may be refused probate.

3. That issues may be framed between the caveator and caveatees of the will, to be tried by jury to determine the facts of the alleged will.

4. That a collector or collectors may be appointed to take charge of the estate of the deceased to serve under bond, until further hearing of the same.

5. And for such other and further relief as to the Court may seem just and proper.

JAMES H. McDERMOTT.

V. O. HILL,
Southern Building,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, ss:

James H. McDermott being first duly sworn deposes and says that he has read the foregoing petition, by him subscribed, and that he knows the contents thereof; that the

matters and facts therein stated upon his personal knowledge are true, and those stated upon information and belief, he verily believes to be true.

JAMES H. McDERMOTT.

Subscribed and sworn to before me this 1st day of December, 1933.

[SEAL.]

LOUIS P. STUMPH.

(Endorsement:) Caveat. Filed Dec. 4, 1933. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

5 *Answer of Katherine R. Simpkins Individually and as Executrix to the Caveat of James H. McDermott.*

The answer of Katherine R. Simpkins, executrix of Hugh McDermott, deceased, and Katherine R. Simpkins, individually, the legatee named in the last will and testament of said Hugh McDermott, deceased, to the caveat filed herein in the above entitled cause represents to the Court:

1. That she admits the allegations of paragraph 1.
2. That she admits the allegations of paragraph 2.
3. That she denies all of the allegations contained in paragraph 3 and aver the facts to be that the said paper writing, dated the 23rd day of November, 1932, is the last will and testament of Hugh McDermott, deceased; that the paper writing was formally executed in the mode required by law; that at the time of the execution of the said paper writing, the said Hugh McDermott was of sound and disposing mind, capable of executing a valid deed or contract; that the said paper writing was not executed under the undue influence of Katherine R. Simpkins, or any other person or persons and was not procured by fraud or circumvention of the said Katherine R. Simpkins or any other person or persons.
4. She is willing that issues may be framed and tried before a jury according to law so as to determine the truth of the allegations of the caveat.

KATHERINE R. SIMPKINS.
KATHERINE R. SIMPKINS,
Executrix.

RAYMOND M. HUDSON,
Attorneys for Executrix,
1343 H Street, N. W.

DISTRICT OF COLUMBIA, ss:

Katherine R. Simpkins, being first duly sworn deposes and says that she has read the foregoing petition, by her subscribed, and that she knows the contents thereof; that the matters and facts therein stated upon her personal knowledge are true, and those stated upon information and belief, she verily believes to be true.

KATHERINE R. SIMPKINS,

Subscribed and sworn to before me this 15th day of December, 1933.

[SEAL.]

JULIUS ARONOFF,
Notary Public, D. C.

(Endorsement:) Answer of Katherine R. Simpkins individually and as Executrix to the Caveat of James H. McDermott. Filed Dec. 15, 1933. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

6

Order Framing Issues.

Upon consideration of the caveat of James H. McDermott, filed herein against a certain paper writing dated the 23rd day of November, A. D. 1932, which was filed herein the 9th day of November, 1933, purporting to be the last will and testament of Hugh McDermott, deceased; and the answer of Katherine R. Simpkins, filed thereto, it is, this 2nd day of January, A. D. 1934,

Ordered, That the following issues be and they are hereby framed to be tried before a jury on the 15th day of March, 1934.

1. Was the paper writing filed in this court and bearing date of the 23rd day of November 1932, the last will and testament of Hugh McDermott, deceased? Yes.

2. Was the said Hugh McDermott at the time of the making and subscribing or of the acknowledging by him of the said paper writing of sound and disposing mind and capable of executing a valid deed or contract? Withdrawn.

3. Was the said paper writing dated the 23rd day of November 1932 purporting to be the last will and testament of Hugh McDermott, deceased, executed and attested in due form as required by law? Yes.

4. Was the said paper writing dated the 23rd day of November 1932, obtained or the execution thereof procured from the said Hugh McDermott, deceased, by undue influence of Katherine R. Simpkins, or any other person or persons? —.

5. Was the said paper writing dated the 23rd day of November 1932, obtained or the execution thereof or the subscription thereto procured from the said Hugh McDermott, deceased, by coercion, fraud or duress practi-ed upon the said Hugh McDermott by Katherine R. Simpkins, or any other person or persons? Withdrawn.

JAMES M. PROCTOR,
Justice.

Agreed to:

RAYMOND M. HUDSON,
Atty. for Executrix.

(Endorsement:) Order framing issues. Filed Jan. 2, 1934. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

7 Now come here again the parties aforesaid in manner aforesaid, and the same jury that was respited yesterday; whereupon the jury, after the case is given them in charge, upon their oath say:

In answer to the First Issue: Was the paper writing filed in this court and bearing date of the 23rd day of November, 1932, the last will and testament of Hugh McDermott, deceased?

They answer "Yes". (By direction of the Court.)

In answer to the Third Issue: Was the said paper writing dated the 23rd day of November, 1932, purporting to be the last will and testament of Hugh McDermott, deceased, executed and attested in due form as required by law?

They answer "Yes". (By direction of the Court.)

In answer to the Fourth Issue: Was the said paper writing dated the 23rd day of November 1932, obtained or the execution thereof procured from the said Hugh McDermott, deceased, by undue influence of Katherine R. Simpkins, or any other person or persons?

They answer "Yes".

Docket Entries.

1934. Mar. 28. Verdict setting aside Will. (Issues Two and Five withdrawn by order of Court).

Witnesses for (Caveator) Plaintiff, 3.

“ “ (Caveatee) Defendant, 3.

8 [Endorsed:] Proceedings before Circuit Court No. Three of the Supreme Court of the District of Columbia, Holding a Special Term as a Probate Court, for the Trial of Will Contests. Mr. Justice Luhring presiding. Frank E. Cunningham, Clerk; George A. Watts, Asst. Clerk.

(Endorsement:) Third Minute Entry. Verdict setting aside the Will. Filed Mar. 28, 1934. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

9 *Order Denying Probate After Caveat.*

It appearing to the Court that issues framed in the above entitled cause were duly submitted to the jury for determination and that said jury answered the first issue, to-wit: “Was the paper writing filed in this court and bearing date of the 23rd day of November, 1932, the last will and testament of Hugh McDermott, deceased?” in the affirmative, and by direction of the Court answered the third issue, to-wit: “Was the said paper writing dated the 23rd day of November, 1932, purporting to be the last will and testament of Hugh McDermott, deceased, executed and attested in due form as required by law?” in the affirmative; and answered the fourth issue, to-wit: “Was the said paper writing dated the 23rd day of November, 1932, obtained or the execution thereof procured from the said Hugh McDermott, deceased, by undue influence of Katherine R. Simpkins, or any other person or persons?” in the affirmative, and that issues number two and number five were withdrawn, by the caveator at the close of the caveator’s testimony; and it further appearing to the Court that the motion for a new trial, for admitting will to probate notwithstanding the verdict of the jury, and for arrest of judgment and admission of will to probate were overruled on the 4th day of June, 1934, it is, this 4th day of June, A.D., 1934,

Adjudged, ordered and decreed, that the prayers of Katherine R. Simpkins for the probate and record of the paper

writing filed in this cause purporting to be the last will and testament of the said Hugh McDermott, deceased, be, and the same is hereby denied; that the paper writing
 10 dated the 23rd day of November, 1932, purporting to be the last will and testament of said deceased be, and the same hereby, is denied probate and record as such will and testament of said Hugh McDermott; and that said Hugh McDermott died intestate.

O. R. LUHRING,
Justice.

To which the caveatee excepts.

LUHRING,
Justice.

6/4/34.

From the above decree the Caveatee notes an appeal in open Court to the Court of Appeals which appeal is allowed and the undertaking of appeal for costs is fixed at \$100 or a cash deposit of \$50 in lieu thereof.

O. R. LUHRING,
Justice.

(Endorsement:) Order denying probate of Will after Caveat. Filed June 4, 1934. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

11

Memorandum.

April 11, 1934. Order extending time for hearing on Motion to April 26, 1934.

June 27, 1934. Order extending time to file proposed Bill of Exceptions to July 11, 1934.

July 10, 1934. Order extending time to file Bill of Exceptions to July 23, 1934.

Oct. 22, 1934. Order extending time to file Transcript of Record to the Court of Appeals.

Undertakings.

Jan. 16, 1934. Collector's Undertaking filed and Letters of Collection issued to Robert M. Gray.

June 27, 1934. Undertaking on Appeal of Katherine R. Simpkins, approved.

Dec. 6, 1934. Bill of Exceptions signed.

Assignments of Error.

Now comes the caveatee and makes and files the following assignments of error:

(1) The Court erred in denying the caveatee motion for a directed verdict at the close of the opening statement of the caveator as there was no statement of fraud or coercion or any cause of action as no facts were stated that would be proved to this effect; mere statements that fraud and coercion will be proved is not sufficient to invalidate a will, but in the instant case no such statements were made.

(2) The Court erred in admitting evidence of conversations two and three years prior to the date of the will and the execution of the power of attorney some time after the date of the will and not anyway connected therewith and of the execution of the change of the Metropolitan Police Relief Association certificate one year after date and of other matters not a part of the *res gestæ*.

(3) The Court erred at the close of the caveator's testimony and again at the close of all of the testimony to direct a verdict for the caveatee as the Court held there was no fraud, coercion or mental incapacity proven and the caveator withdrew issues 2 and 5 based on mental incapacity, fraud and coercion and the Court directed a verdict for the caveatee on issues 1 and 3 relative to due form and execution of the will, as issue 4 was not pleaded and did not constitute a cause of action or ground sufficient to invalidate a will as it did not involve any fraud, coercion or mental incapacity.

(4) The Court erred at the close of the caveator's testimony and after the withdrawal of issues 2 and 5 and a directed verdict for caveatee on issues 1 and 3, and again at the close of all of the testimony, by denying the caveatee's motion to strike out all of the testimony relating, to conversations and quarrels long prior to the will, to the power of attorney, to the change of the Metropolitan Relief Association certificate and all testimony not part of the *res gestæ* and also in denying the caveatee's motion to strike

out all the testimony of the caveator, as no cause of action proven and because issue 4 was not pleaded.

(5) The Court erred in granting the caveator's requested prayer No. 3 as modified by the Court as there was no evidence on which to base same as there can be no undue influence sufficient to invalidate a will unless there is involved an element of fraud, coercion, and/or mental incapacity, all of which elements had been withdrawn from the jury and the caveatee had been forbidden by the Court to introduce any evidence showing there was not any coercion, fraud, and/or mental incapacity, and furthermore issue 4 had not been pleaded and does not state a cause of action and the modified prayer No. 3 confused the jury and was unfair to the caveatee.

(6) For the same reasons as set out in No. 5 and because it confused the jury, the Court erred in the charge of stating the law as it did relative to coercion, fraud, and mental incapacity; this is unfair to, and prejudiced the caveatee as the Court had refused to strike out caveator's testimony seeking to prove fraud, coercion, and mental incapacity.

(7) When those issues were withdrawn to prevent a directed verdict on them and then the Court would not permit any testimony from caveatee denying coercion, fraud, and/or mental incapacity, and directed that the witnesses present for the purpose be released.

(7) The Court erred in denying each and all of the grounds in caveatee's three motions to grant a new trial to arrest judgment and probate the will, and to enter judgment for the caveatee notwithstanding the verdict.

(8) The Court erred in giving a charge that as a whole was too general, too indefinite and not made applicable to any facts and gave to the jury the impression that inferences alone were sufficient to invalidate a will of one mentally capable of making a will where there was no fraud, or coercion all of which confused the jury as the Court discussed the law (although erroneously) applicable to fraud and coercion and this was unfair to the caveatee who had been deprived an opportunity to introduce evidence overcoming fraud, coercion and/or mental incapacity.

(9) The Court erred in denying caveatee's motion to arrest judgment and then admit the will to probate as the only issue submitted to the jury was not pleaded.

(10) The Court erred in denying each of the caveatee's motions after the verdict because it is apparent the jury was prejudiced as set out in ground IX of said motion.

(11) The Court erred in excluding caveatee's Exhibit "B" so that the jury could not compare the handwriting thereof with Exhibit "C" as one of the caveator's witnesses testified that Mrs. McDermott signed the Exhibit "B" and another denied it; it is improper for the Court to determine a disputed fact.

RAYMOND M. HUDSON,
*Attorney for the Caveatee, 409-10 Peoples
Life Ins. Bldg., Washington, D. C.*

(Endorsement:) Assignments of Error. Filed July 25, 1934. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

14 *Designation of the Record.*

Now comes the caveatee and designates and directs the clerk in making up the transcript of the record on appeal to copy the following papers:

- (1) Petition to Probate Will.
- (2) Caveat.
- (3) Answer to Caveat.
- (4) Order fixing issues for jury trial.
- (5) Order containing verdict of the jury.
- (6) Judgment on the verdict.
- (7) Memorandum of orders of continuance, extensions and bonds.
- (8) Bill of Exceptions.
- (9) Assignments of Error.
- (10) This designation of the record.

RAYMOND M. HUDSON,
*Attorney for the Caveatee, 409-10 Peoples
Life Ins. Bldg., Washington, D. C.*

To: Vivian O. Hill, Esq.,
Attorney for the Caveator.

Take notice that on August 1, 1934, I will apply to the clerk for the transcript of the record on the above designation.

RAYMOND M. HUDSON,
*Attorney for the Caveatee, 409-10 Peoples
Life Ins. Bldg., Washington, D. C.*

(Endorsement:) Designation of Record. Filed July 10, 1934. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

15 Supreme Court of the District of Columbia,
Holding a Probate Court.

DISTRICT OF COLUMBIA, *to wit*:

I, Victor S. Mersch, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify the foregoing pages, numbered from 1 to 14, inclusive, to be true copies of the originals of certain papers on file in the office of the Register of Wills, Clerk of the Probate Court, in case No. 45,823, estate of Hugh McDermott, deceased, wherein Katherine R. Simpkins is appellant, and James H. McDermott is appellee, the same constituting a full, true, and correct transcript of record of proceedings had in said cause according to the Designation of counsel filed therein and made a part hereof.

I further certify, that the bond for appeal, in the penalty of One Hundred dollars, was duly filed by said appellant, and approved by said Court on the 27th day of June, A. D. 1934.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Probate Court, this -th day of December, A. D. 1934.

[SEAL.]

VICTOR S. MERSCH,
*Deputy Register of Wills for the District
of Columbia, Clerk of the Probate Court.*

16 [Stamp:] Filed Jul. 23, 1934. Theodore Cogswell,
Register of Wills, D. C., Clerk of Probate Court.

In the Supreme Court of the District of Columbia, Holding
a Probate Court.

Administration No. 45-823.

Submitted Aug. 22, 1934. Joseph W. Cox, Justice.

In re Estate of HUGH McDERMOTT, Deceased.

Bill of Exceptions.

Be it remembered that the above entitled cause came on for hearing before the Honorable Oscar R. Luhring, Asso-

ciate Justice of the Supreme Court of the District of Columbia and a jury on March 26, 1934. Vivian O. Hill, Esq. appearing for the caveator, and Raymond M. Hudson, Esq. appearing for the caveatee.

The caveatee to sustain the issue on her part introduced **Rufus T. Armaly** as a witness, who being duly sworn, testified as follows:

I run a restaurant in the office building at 1103 Vermont Avenue, N. W., and on November 23, 1932, Carl A. Marshall, an attorney whose office was in that building, and whom I have known for several years asked me to go with him and Mr. Henry C. Biscoe to witness a will. We went to an apartment house on "R" Street and were admitted by Mrs. Simpkins and Mr. Marshall went into the room where Mr. Hugh McDermott was in bed and in a moment or two Mr. Biscoe and I went in, but Mrs. Simpkins did not go in and I don't know where she went. Mr. McDermott had the will in his hands and read it and then signed it and declared that it was his last will and testament and asked me and Mr. Biscoe who were both present when he signed it to sign it as witnesses, and Mr. Biscoe and I each signed the will in the presence of each other and in Mr. McDermott's presence, and there was no one else there but Mr. Marshall.

Cross-examination:

It was between 1 and 2 o'clock P. M. Bed room and a front room all rooms I was in.

Mr. McDermott appeared sick. Propped up with pillow. He had book or magazine on which he signed the will. We were in there about five minutes. Did not see Mrs. Simpkins when we left. Mr. Marshall took me back down town. Do not know what happened to will. Turned it over to Mr. Marshall. No one remarked that McDermott was best looking sick man ever did see. Identified will.

The witness here identified the will in issue as the one so signed by Mr. McDermott and the witness and Mr. Biscoe. The witness further stated that Mr. McDermott was in bed but he talked with them and he knew what he was doing.

The caveatee to further sustain the issue introduced Mr. **Henry C. Biscoe**, being first duly sworn, testified as follows:

I have been in the real estate business in Washington and Virginia for several years, and in November, 1932, I had an office adjoining Carl A. Marshall at 1103 Vermont Avenue, N. W., and I had seen Mr. McDermott once or twice when he came to Mr. Marshall's office. On November 23, 1932, Mr. Marshall asked me to go with him to witness a will. We went to an apartment house on "R" Street and were admitted by Mrs. Simpkins and Mr. Marshall went into the room where Mr. Hugh McDermott was in bed and in a moment or two Mr. Armaly and I went in, but Mrs. Simpkins did not go in and I don't know where she went. Mr. McDermott had the will in his hands and read it and then signed it and declared that it was his last will and testament, and asked Mr. Armaly and I, who were both present when he signed it to sign it as witnesses, and Mr. Armaly and I each signed the will in the presence of each other and in Mr. McDermott's presence, and there was no one else there but Mr. Marshall.

Witness identified the will.

17 Thereupon the caveatee offered in evidence the will of Hugh McDermott, dated November 23, 1932, which is the will in issue and that there being no objection the said will was admitted in evidence, and is in the following words and figures:

Last Will and Testament of Hugh McDermott, Filed Nov. 9, 1933.

In the Name of God, Amen.

I, Hugh McDermott, of Washington, D. C. being of sound and disposing mind, memory and understanding, and capable of executing a valid deed or contract, considering the certainty of death and the uncertainty of the time thereof, and being desirous to settle my worldly affairs, and thereby be better prepared to leave this world when it shall please the Almighty to call me hence, do hereby make, publish and declare this my last will and Testament, hereby revoking and annulling all wills and testamentary dispositions heretofore made by me, in manner and form following, that is to say:

First, and principally, I commit my soul into the hands of Almighty God, and my body to the earth, to be taken

charge of by my executrix and to be decently buried at the discretion of my executrix hereinafter named; and my will is, that all my just debts and funeral expenses shall be paid by my executrix hereinafter named as soon after my decease as shall be convenient.

Second, I give, devise and bequeath to Katherine R. Simpkins, of 1420 R Street, N. W., Washington, D. C. that certain piece or parcel of real estate known as 1344 G Street, S. E., being lot 119, Sq. 1043 in the District of Columbia subject to the dower rights of my wife, Maggie McDermott; the said Katherine R. Simpkins having for many years been my friend, housekeeper and nurse.

I hereby authorize, empower, direct and instruct my executrix hereinafter named to immediately after she qualifies as executrix to proceed to sell and convey by sufficient deed in her discretion either at public auction sale or private sale the said property above named being lot 119, Sq. 1043, in the District of Columbia; subject to any trust thereon and out of the proceeds to pay my said wife such commutation in lieu of dower as is provided under the laws of the District of Columbia.

I further authorize and empower my executrix to sell any other of my estate for the purpose of paying my debts.

During my lifetime I have given to each of my children all that I think is proper and all that I wish to give each of them and I have always provided abundantly each month for the support of my family; all of the children are now grown.

All the rest and residue of my estate, both real, personal and mixed, I give, devise and bequeath to said Katherine R. Simpkins;

And lastly, I do hereby nominate, constitute and appoint Katherine R. Simpkins executrix of this, my last will and testament, and I desire that my executrix hereinbefore named shall not be required to give bond for the faithful performance of the duties of that office.

18 In testimony whereof, I have set my hand and seal to this my last will and testament, at Washington, D. C. this 23rd day of November in the year of our Lord, one thousand nine hundred and thirty two.

HUGH McDERMOTT.

Signed, sealed, published and declared, by Hugh McDermott the above named testator, as and for his last will and

testament, in our presence, and at his request, and in the presence, of each other, we have hereunto subscribed our names as attesting witnesses.

H. CURTIS BISCOE,
Residence, 1103 Vermont Ave., N. W.
THOMAS ARMALY,
Residence, 3019 Rodman St., N. W.

19 Thereupon the caveatee rested.

Thereupon the counsel for the caveator made the opening statement of the caveator's contest of the will and stated they expected to prove the following:

That the deceased, Hugh McDermott, was married in 1901 to Maggie McDermott, and there were five children born of said marriage, all living and of age with exception of a son, who was then 20 years old, and that deceased had never been divorced from Maggie McDermott, who was then his widow.

That deceased was a member of the Metropolitan Police force for several years, from which he retired some time prior to 1927 and that after 1927 deceased was employed for some time by the Humane Society, but was unemployed at the date of his death.

That deceased and his family got along well together, he being a kind and devoted father and husband, until sometime about 1918 after he had met one Katherine R. Simpkins, the caveatee, and from thence forward he began to turn away from his wife and children, stay out late at night and finally remain away from home all night. That there came a time when a show-down was had between deceased and his wife because of his association with the said Katherine R. Simpkins, and through no fault or wrong doing of his family, he left them and took up his residence with the said Mrs. Katherine R. Simpkins. That in 1927 deceased and his wife entered into a separation agreement whereby he agreed to pay her \$75.00 per month for the support and maintenance of herself and minor children, she to live in their home and keep up the repairs, taxes and payments to the building and loan association thereon, in which agreement the home was referred to as "belonging jointly to the parties hereto." That deceased lived up to

the terms of the said agreement fairly well until Mrs. Simpkins got an attorney to represent him, but that thereafter the payments dwindled, and finally in July, 1933 they stopped entirely.

20 That from about the time of the World War the association of deceased with Mrs. Simpkins made steady progress from the first casual dates until he finally moved in to live with her. She was his boarding mistress, housekeeper, companion on trips, nurse and paramour. And while Mrs. Simpkins was living at 604 5th St., N. W., the deceased made clandestine visits to her apartment and remained behind closed and locked doors until midnight. That Mrs. Simpkins gained dominance over the will of deceased thereby, and by telephoning him at his home and ordering him to bring her presents, which he did, and by telling him she would not or could not see him upon certain occasions to make him jealous and impress him with the fear of losing her association, and by her superior intellect, she dominated deceased and thereby substituted her will for his in the administration of his ordinary affairs.

That the deceased took a trip to Canada with Mrs. Simpkins before he left home in 1927, and that he took a trip to New York City where he gave his address and Mrs. Simpkins as the same; that they lived together alone at Shady Side, Maryland, and in the District of Columbia where they maintained illicit sexual relations with each other.

During November, 1932, deceased was taken ill and while he was thus sick and his mind weak and easily influenced, and he was unable to resist, the said Katherine R. Simpkins, through the undue influence acquired over deceased, induced and caused him to make an unnatural last will and testament whereby he cut off his wife and children without any just reason or cause, and left everything he owned to his paramour, the said Mrs. Simpkins, notwithstanding that one of his children had recently loaned him a substantial sum of money which had not been repaid, and that deceased was greatly attached to one of his daughters who had attended him constantly and devotedly.

That a day or two after executing the said will deceased was removed to Walter Reed Hospital in an ambulance, where he remained as a patient and received treatments until the Spring of 1933, at which time he was released and was taken to Shady Side, Maryland, by Mrs. Simpkins to

live with her, and on November 8th, 1933, he died at Shady Side, Maryland, in the presence and company of Mrs. Simpkins.

21 That after proving these facts and the Court properly instructs you as to the law in such a case, we shall expect you to bring in a verdict for the Caveator.

Caveatee moved for a directed verdict on opening statement, on the ground that caveator had not stated sufficient facts, if proved, to entitle him to a verdict.

Motion overruled, and exception taken and allowed.

The caveator to sustain the issue on his part introduced as witness, **Mrs. Maggie McDermott**, who, being first duly sworn, testified as follows:

That she and the deceased were married June 26, 1901, and have five children, and lived at 123 C Street, S. E., from 1918 to 1920, and then moved to 1344 G Street, S. E., where she still lives; her husband was a police officer, 56 years old and died November 8, 1933. On April 1, 1927, the witness and the deceased separated and entered into a legal separation agreement which is admitted in evidence as Exhibit "1", which was dated March —, 1927, and is in the following words and figures:

This Agreement, made in duplicate, this — day of March, A. D. 1927, by and between Hugh McDermott, party of the first part, and Margaret McDermott, party of the second part, both of the District of Columbia.

Whereas the said parties are husband and wife, and

Whereas unhappy differences have arisen between them making it impossible for them to live together in peace and harmony, and

Whereas they have mutually agreed to live separate and apart and have, before the execution and delivery of these presents, *spearated* and are now living separate and apart, and

Whereas the party of the first part has agreed to pay unto the party of the second part the sum of Seventy-five (\$75.00) Dollars per month for her maintainance and support and for the maintenance and support of Edward McDermott, a minor child of the parties hereto, subject, nevertheless, to the provisions and conditions hereinafter contained.

Now, Therefore, in pursuance to the said agreement and in consideration of the premises and the desire of the parties hereto to settle their domestic affairs amicably and without resorting to litigation relative to same, do hereby mutually agree as follows:

1. The party of the first part agrees to pay unto the party of the second part, or to her duly authorized agent or attorney, the full sum of Seventy-five (\$75.00) Dollars per month payable in two equal semi-monthly instalments of Thirty-seven Dollars and fifty cents (\$37.50) each, the first instalment of Thirty-seven dollars and fifty cents (\$37.50) to be paid upon the execution of these presents and
22 a like sum to be paid on the 2nd and 16th days of each month occurring thereafter.

2. The party of the second part, for and in consideration of the party of the first part agreeing to make the said payments unto her in the said sum of Seventy-five (\$75.00) Dollars per month in manner and form as provided in paragraph one of this agreement, for the maintenance and support of herself and Edward McDermott, minor child of the parties hereto, does hereby covenant and agree to waive all further right and title to any further support or demand for support from the party of the first part as long as the said party of the first part makes the said payments to her in accordance with this agreement.

3. The party of the second part hereby further agrees that from the said monthly payments to be paid to her by the party of the first part, she will make all payments due on the trust indebtedness to the Building Association, defray all other expenses incident to maintenance and upkeep of premises No. 1344 G Street, S. E., Washington, D. C., belonging jointly to the parties hereto, including taxes, water rent, fire insurance, etc.

4. It is further mutually understood and agreed by and between the parties hereto that the said sum of \$75.00 is to be paid by the party of the first part to the party of the second part in full for the support and maintenance of the party of the second part and the said minor child and that she will not, at any time, contract any debt in the name of the party of the first part nor will she require or expect the party of the first part to pay any debts contracted by her during the existence of this agreement or as long as

the party of the first part shall comply with the terms of this agreement.

In witness whereof the parties hereto set their hands and affix their seals the day and year first above written.

(Signed) HUGH McDERMOTT. (Seal.)

In presence of:

(Signed) J. B. FLYNN.

(Signed) MAGGIE McDERMOTT. (Seal.)

In presence of:

(Signed) J. B. FLYNN.

Witness testified that five or six months prior to the deceased's death that he quit making payments and she went to see Carl A. Marshall, his attorney to inquire about the payments and later Marshall came to her house with a paper from the deceased saying he was in Reno, that he wanted her to sign so that he could get a divorce, and she sent him to another attorney, Michael Doyle.

Later the deceased was in an apartment on R Street and she heard afterwards that he was in Walter Reed Hospital. She testified Marshall said the deceased did not have any money to make the payments. Witness testified that when living at home, the deceased went to Canada on a ten days trip, and that after the legal separation he went to New York for a while and regularly sent her payments. Wit-

23 ness testified while he was in New York she received a communciation which is in his handwriting; that is how I found out that he was there, which was offered and admitted as caveator's Exhibit "2". The exhibit was in the following words:

Nov. 12/27.

"Catherine, Elliott and Birnie.

FRIENDS:

I am enclosing \$37.00 and two cent stamps. Please mail, register it for me and oblige. Everything is going fine so far. Will be back on the 1st of Dec. Will write you a letter Sunday.

CATHERINE AND MACK."

and on the reverse side of the communication was the following:

“Excuse this paper. The new address, Mrs. K. Simpkins, 2013 5th Ave., Section B, Apt. 14.”

Witness testified that deceased and she got along nicely until he met the caveatee. Then he became indifferent to children and later would not eat at home and later on would stay out until midnight, and later on all night; Mrs. Simpkins called him up on the phone and the deceased told witness who it was; witness then told the deceased that he must stay at home or must go to Mrs. Simpkins; he replied “I would but I can’t”; and he got mad and left the house; this was in February of 1927, before the separation agreement and after the agreement the deceased took up his abode at the home of Mrs. Simpkins. The witness and the caveator went to the home of Mrs. Simpkins but did not see much as the deceased rushed out and they saw Mrs. Simpkins and her son; Mrs. Simpkins used some rough language and then went out to get the police; witness learned of the deceased’s death through her attorney, Hill, and then she went to the funeral parlor and saw the body and the undertaker refused to change the funeral plans; deceased was buried in Fort Lincoln Cemetery in the lot belonging to Mrs. Simpkins.

24 Cross-examination:

Witness testified that she received the communication, Exhibit “2” about November 14, 1927, and parties named in it are friends of the deceased; it was not intended for the witness but she received it.

Shown two communications marked Exhibits “B” and “C” for identification, witness admitted she authorized the one marked “C”, and signed by her son, Edward, but she don’t know *signed* who signed the other, being Exhibit “B”.

Witness got a \$30.00 per month pension for two years until July, 1933 and applied it as part of \$75.00 under the separation agreement; the deceased had nothing to do with the stopping of the pension as he also got \$58.50; they were Spanish American and World War pensions; witness tes-

tified that during the time the deceased was at Walter Reed Hospital the payments to her under the agreement dropped from \$75.00 to \$15.00 per month. Before the pensions were stopped, deceased's income was \$283.50, being \$100.00 from the Metropolitan Relief Association, \$125.00 salary from the Humane Society, and \$58.50 pension from the Veteran's Bureau; deceased kept up his payments to the witness as shown in a letter from her attorney, Hill, to the attorney Marshall, dated July 17, 1933, which was Exhibit "D", and read to the jury in which suit was threatened and in which it was stated:

"Mr. McDermott cannot in reason expect Mrs. McDermott to keep the taxes paid up when by his own attorney's admission he owes her for one month—July—and by the recent conversation terminating in a payment to her of \$17.00 that was admittedly back due, and while she claims he is back two months in all."

There was paid for the Building Association, July 11, 1933, \$28.00; to her attorney May 3, 1933, \$17.00; May 13, 1933, \$17.00; July 8, 1933, \$17.00; March 16, 1933, \$22.00.

Witness testified that in 1933, the deceased offered to convey the home to her, but she refused to accept the conveyance because she could not keep it up when deceased stopped remittance.

Redirect examination:

Witness testified that she makes \$3.00 a week from her sister temporarily and \$30.00 per month room rent, and got \$30.00 from the Veteran's Bureau which was stopped in July, 1933.

25 The caveator to further sustain the issue introduced as witness **Mrs. P. J. Matthews**, who being duly sworn, testified that she saw the deceased and Mrs. Simpkins in 1918 at 604 Fifth Street, N. W., as she and the caveatee lived on the fourth floor and the caveatee used her phone and introduced the deceased. The deceased took his meals at the caveatee's and usually left at 11 P. M.; when deceased was at Mrs. Simpkins' house you couldn't get in; Mrs. Simpkins did the laundry of the deceased. The deceased and Mrs. Simpkins and her son went on a trip to Canada while living there. Mrs. Simpkins told her he

bought a car to take them in. Witness heard the caveatee ask the deceased to bring her a compact and a half pound box of candy, which he did. Afterwards Mrs. Simpkins said, "See, I am as popular as — young girl." On one occasion when Mrs. Simpkin's mother was sick she could not see McDermott. She said she was glad to get a chance to turn him down; that it made a better impression.

Mrs. Simpkins' mother came later and lived with Mrs. Simpkins and Mrs. Simpkins said she could remain with her if she kept her mouth shut, and as long as she would be satisfied with things as they were.

Cross-examination:

Witness said that Mrs. Simpkins' son was grown and he and her mother, besides the deceased lived with the caveatee, and another boarder came and ate for awhile.

To further sustain the issue the caveator introduced **Bernard M. Elliott**, who, being duly sworn, testified that he had known the deceased and Mrs. Simpkins for ten years and that the families visited back and forth. That after he had known them about one year Mr. McDermott told him that he was a married man. Witness stated that deceased sent him checks when away and he sent him back *the money to be forwarded to Mrs. McDermott*; he did not think the caveator's Exhibit "2" was the handwriting or signature of the deceased, but would not say that it was not in the

26 handwriting of the deceased. In December, 1932, the deceased was in the hospital and the caveatee was with him and he was quite sick, but told witness of his trip to Reno where he was taken sick and came home sick. Witness stated he had observed the deceased and Mrs. Simpkins and cannot say who was boss and they seemed very fond of each other. Witness stated that the deceased told him he was buying a home on G Street, S. E., and was paying Mrs. McDermott \$75.00 per month. Witness stated that when he and his wife visited at Walter Reed Hospital, that the caveatee brought the deceased out on the sun porch and said, "Here are Birnie and Catherine"; witness can't say anything about the deceased's mind; the caveatee always looked after the fixing of the deceased's food and she carried out the doctor's orders in that regard; witness stated that the apartment on the first floor of 1420 R Street, N. W., occupied by Mrs. Simpkins contained three or four rooms

and a porch, and the second floor apartment was the same. Mrs. Simpkins told us that Mr. McDermott was sick; we only visited the hospital once, but we did not attend the funeral as we didn't hear of his death until later.

Here counsel for caveator claimed surprise and cross-examined witness.

Witness, continuing, said: "I told you Mr. McDermott said he was buying a house and giving his wife \$75.00 per month and would not do otherwise." Witness stated he does not remember having heard caveatee tell Mrs. Elliott that if deceased had remained at Reno he would have obtained a divorce. Witness denied he had stated to Hill that the deceased had told him that he had had trouble with Mrs. Simpkins and had slammed the door of the car.

Cross-examination:

Witness stated that two years after meeting the deceased, the latter told him he was paying his wife \$75.00 per month.

The caveator to further sustain the issue introduced as a witness **Mrs. Bernadette Monaco**, who, being duly sworn, testified that she was the daughter of the deceased, but she was not living at home in 1927, having left there when married in December, 1923. Witness stated her mother and father had a few arguments when the former found he was going with Mrs. Simpkins a year before I left home, but her father didn't say much. Mother asked him about staying away and he didn't answer; witness does not know that he stayed out all night. Witness saw her father on an average of twice a month after she left home. He would come to see me. At times he complained that he was not well and had high blood pressure; and three years before his death he bought her tickets to a circus and he seemed upset. Witness stated her father had always inquired about his children and he seemed interested in them and seemed to have a load on his mind and wanted to forget. Witness visited him regularly at the R Street apartment and saw Mrs. Simpkins and they had a kitchen, living room, two bedrooms, a reception hall and bath, and her father had a bedroom to himself. Witness stated that her father and caveatee went to a bungalow in Maryland in 1933 and she

visited him there and Mrs. Simpkins prepared special diets for her father which were required. He was a policeman for 25 years and then worked for the Animal Rescue League. Witness stated that Mrs. Simpkins phoned her and she went to see her father at Walter Reed Hospital in 1932, about 7 P. M. and found him in bed in a ward and while he knew the witness he didn't talk much and was very sick and witness noticed a big change in him; he went from bad to worse; witness went to see him two or three times a week. One day her father had been in the operating room for treatment and then she went in and when she went into his room there was a notary public, a Red Cross nurse, Mrs. Simpkins and a man standing beside the bed. He had just been brought down from the operating room. He did not know me. Mrs. Simpkins said the deceased was signing a paper about some checks. I asked Mrs. Simpkins what they were going to do and she said they were going to sign some papers. The first signature was no good and I wouldn't let them bother him but told them to wait. I asked Mrs. Simpkins what it was about and she said some checks. After I told them to let him alone then in twenty minutes, after he came to, he signed again.

The caveator offered and it was admitted in evidence the paper just mentioned as Exhibit No. 3, which was a power of attorney executed by Hugh McDermott and dated December 5, 1932; authorizing Mrs. Simpkins "to sign and/or
28 endorse my name to any and all checks, drafts, money orders, notes or other negotiable instruments payable to my order or endorsed to me and to receive the cash for same," on which the first signature seems erased.

Witness testified her father left Walter Reed Hospital in April, 1933; witness testified her father was a member of the Metropolitan Relief Association, and she paid some dues for him, and he endorsed his relief certificate to her in 1931 and that in October, 1933, witness told him that she was told Association had gone bankrupt and gave him back the papers. When he took the papers he said he would look up the bankruptcy. Witness testified that her father changed the relief certificate on October 19, 1933, to Mrs. Simpkins. Witness stated that \$1,400.00 of the relief fund is now in litigation. Witness stated that Mrs. Simpkins

was at her house only twice and deceased did not say much when with her and that Exhibit "2" is in the handwriting of her father. Father said, "This is your home. You'll have your home. It is yours." Witness stated Mrs. Simpkins phoned her the night her father died and witness met her at the office of Mr. Carl A. Marshall, at about 10 P. M., where Mrs. Simpkins told her that her father's body was at the undertakers and that all arrangements had been made and when witness suggested they get a priest, Mrs. Simpkins got one.

Cross-examination:

Witness testified that caveatee's Exhibit "C" was signed by her mother, Mrs. McDermott. Witness visited her father and Mrs. Simpkins at Shady Side, Maryland.

Witness identified caveatee's Exhibit "E", "F", and "G", which were admitted in evidence and are as follows:

EXHIBIT "E".

1622 Mass. Ave., S. E.

DEAR DAD:

I have been wondering how you have been since I saw you last. Been thinking of you all the time, but just kept putting off writing all the time, when night comes I am so tired I just fall in the bed.

29 Everybody is O. K. up here, same old thing. I heard they have been trying to locate you. Your car was seen at North Beach so Hill really knows now where you are. So the fire works are really going to begin, so I hear, her pension has stopped, the people upstairs moved out because she asked for more money so she put the sign up and rented them to some people, the man is a sargent at No. 6, I don't know the name and they all work and to make extra money she is taking care of the baby the people have.

Edward is still sitting on his behind and riding the car. I also heard that Jim was down there the other nite and they are planning to do something so I thought I would put you wise. They were planning something serious I think. She was saying to him, "I can't let him get away with this, I am going to really start something this time. I have kept from doing it before but he can't get away with this." So

that is the cry now. Ha Ha. I don't know whether it is about the house or the money.

Jimmie was sent to the training school and lost twenty pounds, he really looks good. Nadee is O. K. going with a new boy friend, an interne in St. Joseph's Hospital in Balto. He sure is a swell fellow.

What are you all doing down there now? How is Mrs. Simpkins? I bet she is plenty busy working and fixing everything. Why don't you write a long letter telling me everything and how you all are and what you are doing and if you don't write call up when you come up to town. Tell Mrs. Simpkins I would like to hear from her too.

Jean started in the Catholic school today, boy, was she happy. Were you all affected by the storm we had? That sure was terrible; Wash. was a mess. Nadee said Western Electric was crazy over there, all the phones down every place. Had all police and firemen on duty. Hundreds of trees fell and homes ruined. The rain just poured in our house and knocked the aerial down.

Dad, burn this letter as soon as you all read it because it is not safe to keep anything in writing.

Be sure to write me and let me know what is going on and let me know all the dirt. If anything sudden comes up, I will let you know. Hope everything is O. K.

Joe, Jean and Albert send their love.

BERNADETTE.

EXHIBIT "F".

September 22, 1933.

DEAR DAD:

Received your letter and was sorry to hear you have had a spell, hope by the time this letter reaches you, you will be feeling well again. Tell Mrs. Simpkins when I say your letter she knows I mean her letter too as when I write to you I am writing to both of you. What are you both doing with yourselves now it looks like to me that winter won't be very long now, people up here are getting their coal in, thank God we got ours in May. How did the storm hit down there?

Marguerite called me up yesterday, same old talk as usual, too tight to buy the child some winter shirts, she's

got more money than we'll ever have, she always asks if I have heard from you and I always give her the same answer, No. Nadee came over last night. She told me that

30 Western E. is terrible busy now they are going to take on some girls and give back one of the cuts Nadee got, so that sounds good.

Albert belongs to a club now, I swear you would die laughing at him, after breakfast every morning he gets up from the table and says he has to go to the club, consists of about six little boys and one dog named Flip. Albert is too young to go to school. He is only four yrs. He sure misses Jean now.

Jean is going to the Catholic school now and is getting along splendid. She is crazy about the Sisters, she also starts dancing Sat., Sept. 30, so our days are pretty well taken care of. Which doll does Mrs. Simpkins mean?

I thought that talk was all wet about seeing the car at N. B. but I just thought I would tell you what I heard. I don't hear very much any more but who cares, talk must be cheap, I used to hear so much of it. I heard they are going to take the house out of your name and put it in her name so that is just what I heard. I don't know what goes with it or what they are doing about it.

Jimmie must be doing things for her, maybe he wants it himself. He lost his house and I guess he is tired of renting this other one now. Mary has quit working now so I guess they will be in a hole now. It is a wonder he wouldn't wake up now and see what it is all about and settle down one way or another. He ought to join the Marines and see the world instead of the fire dept. Don't you think so?

My time has been pretty well taken up, Joe working Sundays and Jean going to school, that I haven't been able to come down and now with every day taken up I just can't say when I will make it but when you come up to Wash. why not come and see us because I hate to promise that I will come and then something turns up and can't make it, if you come up here and can't stop, well, phone me.

Edward has started back to Eastern. He worked a little this summer, but I don't know where. He still has the car. The rooms are rented. Hope you both are well and don't work too hard down there. Tell Mrs. Simpkins to write again and tell me everything, have you all had anything new done to the house or fixed the yard? Everyone is well here

and busy also. Must close now and go to bed. I have to get up so early now. I can't get used to it, after sleeping late this summer. Be sure and answer this soon. With lots of love from everybody,

BERNADETTE.

EXHIBIT "G".

October 8, 1933.

DEAR DAD:

I spoke to Joe and we talked it over. He said that in as much its been a year since we loaned you the money he had been expecting part of it and that we could use the money now because since the banks have been closed things have been pretty tight for us. We got \$200 in a closed bank and when it opens it seems now that we'll get only 35 or 40 per cent of it. Our taxes that were due Sept. haven't been paid yet as we expected most any time to get a little from you. We realize all you have gone thru, and you know we never once asked for any of it.

31 We need the money more than the piano. The piano we have now is really only an ornament but we are not ready for anything else right now. Joe works regular and we are trying to get a little put aside because we can't tell when something will happen to us and we don't know any one to turn to help us. Before the banks closed that little we had we knew we could depend on that but now even that's out of our reach. You know why Dad, we haven't been down on Sunday to see you because Joe has been working his Sun. off trying to make a little extra money. We have lots of expenses with the house and the children and doctor's bills. We've got a \$70 doctor bill to be paid yet, coal to buy yet and every year by this time since we have been married we had our winter supply in. Joe carries a lot of insurance which costs and it seems that without anything to fall back on we are in a devil of a fix.

We had been expecting now that you are well you would find a way to pay us back, if not all at one time, about \$50. each month as we really need it.

I am sure you understand that if we didn't need the money we would not bother you about it at all, as you know we haven't worried you in the past year about it. Expecting to see you Wednesday.

With love,

JOE & BERNIE.

Redirect examination:

Witness stated, "I don't think my father's relations with Mrs. Simpkins ————. I wanted him to live with my mother, but he would not."

The caveator to further sustain the issue introduced **Margaret M. Casper**, who, being sworn, testified that she was the oldest daughter of the deceased and lived at home until she was married in January, 1926, and that she helped support the family and paid on the house for eight years when she was working in the Government. Witness stated that her father and mother got along good until he met Mrs. Simpkins and then he was a changed man. Witness heard that her father was at Walter Reed. Witness stated her mother never discussed Mrs. Simpkins and the deceased with her children. "Father didn't come to see me, when my baby died and I didn't see father after March, 1927; he came to see me when my baby was born in Sibley Hospital." After deceased left home she phoned for him once at 1420 R Street. A woman answered and asked who was calling. I did not state who and didn't get my father. Witness heard about her father's being in Walter Reed Hospital after he was well.

32 Cross-examination:

I phoned father when he came out of Walter Reed Hospital but I did not go to see him. Witness stated that she knew her mother was getting an allowance from her father. Witness stated she did not know where her father was and did not go to see him but that she saw her mother every week.

The caveator to further sustain the issue introduced as witness **Charles Cothman**, who, being sworn, testified that he was formerly the janitor of the apartment house at 1420 R Street, N. W., and he knew the deceased and Mrs. Simpkins and they lived in apartment 1, two rooms, kitchen and bath and witness had seen them go out several times in auto. He testified that one day about three years ago, the deceased and Mrs. Simpkins were going riding and the deceased asked him to keep the dog, but Mrs. Simpkins objected and after argument they took the dog with them.

witness stated that on another day, about 6 or 7 P. M., he heard what he thought was quarreling between the deceased and Mrs. Simpkins, and then in a little while he saw Mr. McDermott go out.

The caveatee objected to all this testimony and moved to strike it out as it was not part of the *res gestæ*, as it happened long before the writing of the will and *and* is not relevant and/or material, which objection and motion the Court overruled, to which the caveatee excepted and the exception was allowed.

On cross-examination the witness testified this happened 2½ or 3 years ago., about three months before I quit the building. I was not there when she moved on the second floor. I saw the dog incident when I was working in the back apartment and he came to the door and he asked me to keep the dog and finally they decided to take the dog. One rainy afternoon I heard what I thought was a quarrel. They were in their apartment and I was in the basement. I could not hear what they said. They talked unusually loud. I knew Mr. Mac's voice.

The caveator to further sustain the issue introduced **P. J. Sappell** as a witness, who, being sworn, testified that he is an undertaker and has known Mrs. Simpkins twenty
33 years and she made arrangements for the funeral of the deceased and paid \$100.00 on account and the deceased was buried in Fort Lincoln Cemetery in a lot belonging to the caveatee. Witness testified that attorney Hill requested that the funeral be held up until 9:30 A. M., but because Father Kock, the Chaplain at Walter Reed Hospital, could not get away for the later hour as it was Armistice Day, I refused to delay the funeral. Witness had seen the will.

The caveator, **James H. McDermott**, to further sustain the issue, being duly sworn, testified that he is the son of the deceased and lived with his parents until he was married on April 24th, 1928, and his parents got along all right until the caveatee came into their lives about 1926 or 1927, and his father came home regularly to his meals then, but stayed away some thereafter; his parents discussed phone

calls and his mother argued about the caveatee calling; witness answered the phone once or twice and Mrs. Simpkins hung up. Witness heard his mother tell Mrs. Simpkins not to call again or she would call the police. Witness saw his father at the R Street Apartment on inspection, and at the engine house where witness was on duty when his father came to see him. Witness stated on one occasion he asked his father to go to supper with him, but he refused, stating that Mrs. Simpkins would be waiting supper for him. When witness asked him if he didn't want to go back home the father replied he didn't because the caveatee would cause trouble, if he did on account of his pension and job at the humane society. Witness tried to reach his father at Shady Side, when he stopped sending money to his mother about a month before his death. Witness stated that his father phoned him about November 2, 1933, that he received a letter from the witness and witness wanted to see him personally. He said he couldn't come out there, if witness wanted to see him come to Marshall's office, but witness didn't go. Witness stated that Marshall told him at the time that his father was in Reno; that it was none of 34 the witness' business where the father was, but he then told witness that his father was in Reno. Witness stated that he and his mother went to Walter Reed Hospital during the first week of April, 1933, and when they got near his father's door his mother saw Mrs. Simpkins and would not go in. Witness stated later that "we phoned two or three times inquiring about father." Witness stated his father worked as steward at the Harrington Hotel before he went to the Humane Society.

Cross-examination:

Witness stated he did not know his father had gone to Reno and also stated that the last time he saw his father was at a distance at Walter Reed Hospital on a visit the first week in April, 1933.

Witness identified a letter he wrote to his father to Shady Side, Maryland, October 30, 1933, which was introduced as Exhibit "W" and is as follows:

4338 River Road, N. W.,
Washington, D. C., October 30, 1933.

DEAR DAD:

I have been wanting to see you for some time. I called at the Hospital in the spring when I heard you were there, they told me you had left the Hospital a week before. I then called at 1420 R St., N. W. in June; they told me you had gone to Maryland. I thought you would be back by this time. Don't you think it just as well and better for us to have a settlement between ourselves as to be paying a lot of money to lawyers. As you know my mother has no money. I have had to help her and Edward this past summer and fall. The Veterans has cut her off altogether. Edward can't get anything to do, she is trying so hard to keep him at school the rest of this season. The rooms have been vacant most of the summer. There has been parties to look at them but they don't want to give anything for them. Aunt Nellie has helped lately but she is now very sick, she is under big expenses, two nurses and two doctors. Marguerite expects to go to the Hospital at any time. She is not at all well. The taxes are now due. I have had my hands full too with this place. As the taxes out here are very high. Still I like the little home and I am trying to hold it.

Well, Dad, I would like to see you to talk things over. My Mother has got to have some help. She is not as strong as she used to be. Hope you are feeling better. My phone number is Cleveland 4564. With kind regards. Your son,
JAMES McDERMOTT.

35 The witness testified that after his father received this letter he phoned the witness that he wanted to see him. Witness testified that from 1927 to 1929 he didn't see his father and didn't know where he was, but that from 1929 to 1932 his father would often come by the engine house to see witness.

The caveatee recalled for further cross-examination, **Mrs. Bernadette Monaco**, who testified that the money mentioned in her letter to her father, dated October 8, 1933, was \$175.00 she loaned her father to go to Reno to get the divorce and that no part of it had been repaid. This letter is first one and we asked for \$50 and he came to see me.

Mrs. Simpkins was with him. He wanted me to take a piano—Mrs. Simpkins' piano in exchange for money.

The letter was admitted as caveatee's Exhibit "G", and is hereinbefore set out.

The caveator here rested.

Thereupon the caveatee renewed her motion for a directed verdict made on the opening statement of the caveator. Thereupon the Court indicated it would direct a verdict in favor of the caveatee as to issues Nos. 1, 2, 3, and 5, and thereupon the caveator announced that he would and did then withdraw and would not further rely upon the issues Nos. 2 and 5, and thereupon the Court announced it would permit the withdrawal of issues 2 and 5 and that the Court would direct a verdict on the issues 1 and 3, and further announced that no further evidence would be required or permitted as to the issues 1, 2, 3, and 5, but would not direct a verdict for the caveatee on issue 4, to which ruling of the Court in refusing to direct a verdict in favor of the caveatee on issue 4 the caveatee excepted, which exception was allowed. Thereupon the caveatee renewed her different motions to strike out certain evidence and also moved the Court to strike out all the evidence, as the fourth issue did not constitute a cause of action and because there could not be undue influence unless there was coercion or fraud and as the issues 2 and 5, involving fraud and coercion, had been withdrawn by the caveator, that the caveator had thereby put himself out of Court, and because the fourth issue was not pleaded, which *the* motions the Court overruled, to which rulings the caveatee excepted, which exception was allowed.

36 After the caveatee began presenting her testimony, some witnesses appeared who were to testify under the issues 1, 2, 3, and 5 and the caveatee's counsel stated to the Court that the witnesses were there and that counsel wished to know if the Court still adhered to its announcements that no testimony would be permitted or required relating to issues 1, 2, 3 and 5 and should the witnesses be permitted to depart, and the Court again announced that there would be no testimony permitted or required under the issues 1, 2, 3, and 5, and that the witnesses should be released and sent home, which was accordingly done.

The caveatee, being first duly sworn, to sustain the issue, testified that when she first came to Washington, in 1922, she was introduced to the deceased by her son, as the two had been eating at the same restaurant prior to witness' coming to Washington. Later witness' son, a grown man, brought the deceased home to dinner one evening and he was so pleased with the meals that he wanted to come and board and it was agreed that he should do so and he would pay her \$5.00 a week. Witness stated that in 1923 she and her son, and the deceased took an automobile trip to Canada, each one paying his own expenses; there was no secrecy about the trip. In 1927 after the deceased entered into the separation agreement with his wife he came to room and board with the witness' family at 828 18th St., N. W.; the family consisted of witness, her mother, and her grown son. Witness left Washington in August, 1927, having accepted a position in New York and the deceased came up there once to visit her but he did not stay at her apartment. Witness stated that the deceased put her address on a letter he mailed to his wife because he wanted her to have an address where she could reach him during the day and evening as he only went to his room late at night and left early in the morning. Witness stated the deceased had his agreement with his wife and under it he was privileged to come and go without being molested or interfered with by her. Later in 1928, the witness returned to Washington and after her son's death in 1930 the
37 deceased took over the apartment and the witness became his housekeeper. In October, 1932, the deceased's daughter, Bernadette, and her husband came to the apartment and loaned the deceased \$175.00 with which to go to Reno to seek a divorce and told him it was the best thing for him to do and to make a success of it. Bernadette called witness almost every day and was on the best of terms. Witness stated deceased was taken ill in Reno and came back on November 20, 1932. While deceased was in Reno he sent money to be given to Mr. Marshall to pay Mrs. McDermott and the Building Association, which was done. Witness testified that during all the time she knew the deceased, his daughter Bernadette, kept in close touch with him and kept him informed of the family. Witness stated she received a telegram from deceased to do so and met him on his arrival from Reno and took him to the

apartment in a taxi as he was able to walk some and sit up; on arrival at the apartment, witness called the doctor to see deceased. Witness testified that on November 22, 1932, deceased asked her to phone Mr. Marshall to come up, that he wanted to see him and then he asked her if she knew what he wanted with Marshall and she stated that she did not. When Marshall and the two witnesses left Mac asked me for a drink of water and said, "Do you know what they were doing here?" and he said "I made a will, something I wanted to do for a long time." Witness said to him, "Don't talk to me about a will." Nothing else was ever said about the will by the deceased to the witness. Witness testified that she never knew anything further concerning the will until after the death of the deceased on November 8, 1933, saw the will the next day after Mac's death in Mr. Marshall's office on November 9, 1933. Witness stated deceased was taken to Walter Reed Hospital on November 24, 1932 and remained until April, 1933, and that she was with him most of the time, and the deceased was anxious to have the witness present.

The witness stated that Major Knarr, the heart specialist at Walter Reed, said to Mrs. Simpkins; "Mac is not able to be bothered about signing checks and business mat-
38 ters. He has an attorney hasn't he? Witness said yes. Major Knarr said, "Well, have him come out here and have Mr. Mac give you a power of attorney to handle his business." Witness asked deceased about it and he directed that she have attorney Marshall draw up such a power of attorney, which she did and when Marshall brought the power of attorney up to the Hospital the next morning, Major Knarr told him to get the notary public, Mr. Blandford, and a red cross nurse, which she did. Witness stated that when they came into the room that the deceased signed the power of attorney, but as his signature was not written on the line as clearly as the notary desired, as the deceased had shortly prior thereto returned from the clinic from a treatment, the notary said, "I am going to erase his name—I want it down on the line," and suggested to wait a few minutes until his nerves quieted and then have him sign it again which was done and the notary certified the acknowledgement. Witness stated Major Knarr advised that the deceased be taken to the country when he left the hospital where he would have the country

air, be quiet and away from the city so that he could get well and witness stated that she purchased the cottage at Shady Side, Maryland on the Bay with some of the money she received as compensation from the Insurance Company from the death of her son, who was killed while doing electrical work. I moved Mr. McDermott down there and saw to it that he had proper food, proper rest and proper exercise. Witness stated that Mr. and Mrs. Monaco spent the day several times with the deceased and the witness at Shady Side. Witness testified that Mrs. Monaco told her father that the Police Relief Association was bankrupt and when he went to their home to get the papers. "I told him to tell Bernadette that I would let her have my piano in satisfaction of the \$175.00 she had loaned her father to go to Reno." Witness stated deceased took the Police Relief policies back to the beach with him that day in September and nothing more was said about it. One day after witness and the deceased returned to Washington, October 8, 1933, for the winter, the deceased requested the witness to drive down town with him and he drove to Police headquarters

and he said he wanted the witness to go in with him

39 and he did not tell witness what it was about; but when they entered Mr. Crawford's office, the deceased asked Crawford about the certificate and Crawford told him it was absolutely all right and the deceased told Crawford he wished to change the beneficiary and asked if it was all right and Crawford replied, "Why, yes, Mac. whom do you want it changed to?" And the deceased stated, "To Mrs. Katherine Simpkins," and then Crawford asked the witness if she had a middle initial and she replied, "Yes, 'R'," but that the witness hardly ever used it. Witness stated that then Mr. Crawford dictated the change of the beneficiary and it was written up and signed by the deceased without any discussion with anybody. When it was through, witness remarked to deceased that she didn't know that that was what he was going to do when he brought her there and deceased replied, "Well, it's all right, isn't it?" and deceased asked Crawford if everything was all right and Crawford said, "Yes, destroy the other paper." Witness testified that when they returned to the apartment the deceased said to her, "Well, I have done the thing I should have done long before, now and I want you, Mrs. Simpkins, to carry out all my wishes for you are

the only one who has ever been good to me and waited on me." Witness stated she and deceased were driving from Shady Side to Washington in the afternoon and deceased was taken ill in the car and she took him in to Dr. Dent's and he died on the porch. Witness phoned Sappell, the undertaker, and the witness phoned Marshall and that evening when we reached Washington, witness phoned Bernadette and had her come down. Witness testified that she paid \$100 to the undertaker on account of the funeral expenses. Witness testified that the auto she has now was purchased by her with her own money received as compensation for the death of her son and was paid for in full by her and the deceased did not pay one cent on it, but that the contract and title was put in their joint names. "Mac knew he couldn't get well and Dr. Gladding said to him: 'You are liable to live ten years and liable to die any minute. Don't drive an auto.' Mac told me where he wanted to be buried and decided that he would like to be
40 buried in that vacant grave in my lot and wanted his watch and wedding ring buried with him. I gave Bernadette the watch fob she had found and given to her father when she was in school. I never called Mac on the telephone. I had no occasion to but Mrs. McDermott rang my phone incessantly."

Cross-examination:

Asked how often she kissed the deceased the witness stated, "Only once and that was after he was dead."

"I have been living separate from my husband since 1917. My occupation was that of a demonstrator when I met Mr. McDermott and prior to that I was also a demonstrator. Before that I was a housekeeper at Atlanta, Georgia. In 1895 and 1896 I was a widow. Henry H. Reynolds was my first husband. I divorced him. Was my husband's stenographer. Had not studied nursing. When McDermott began taking meals with me he paid me \$6.00 per week and \$24.00 per month. He took two meals a day. After McDermott came to live in my house he paid by the month—\$60.00. I did his washing, ironing, furnished the meals and room. This changed after we moved to Apartment 22 and he paid around \$50.00 per month for the same service. When we moved into apartment 24 he paid the rent, gas, light, grocery bill and telephone. He couldn't pay me a salary be-

cause he didn't have it. In September, 1932 he told me he was going to Reno; that he had taken all he could take and had stood all he could stand and was going to Reno to get a divorce. Bernadette and Joe came over to our house and they talked it over, and they said that was right and they loaned him \$175.00 for the trip. Again on Saturday night before Mac left on Sunday Joe said to him, 'Don't come back without that divorce.' I told Mac several times that if he could be happy he had better go home. He hindered me in my work as a demonstrator. I worked out of Baltimore and at one place at York, Pennsylvania, my demonstration lasted ten days. This was the latter part of 1924 and 1925. In 1929 the last work I did was at the Food Show for two weeks. I broke my arm in 1929 and had to give up the work. Mac said he couldn't go back home because he couldn't get along with Mrs. McDermott because she put him out and nagged. My son died in March, 1930. My son
41 was home on the 16th. Nearly a year after my son died Mac talked to me about the divorce. I did not advise him to go to Reno. I could keep myself. He went. I was afraid of the bad climate out there. I did not tell Mrs. Monaco that he was carried out on a stretcher at the station. He walked out and got in a Diamond Cab and when we went into the apartment he said he felt pretty bad but hungry; that he had nothing to eat. I gave him coffee and grapefruit and called Dr. Schultz and told him I wanted to get a doctor and he said to get my sister's doctor, Dr. Huffman. He got there at 8:30 or 9:00 A. M. Sunday. He treated Mac and was there thirty minutes. Mac was in bed then and didn't get out of bed. I fixed him to eat what the doctor told me to fix. The doctor called the next day in the morning. The doctor said Mac is a very sick man. Keep him quiet and I think he will be all right in a few days. Mac had a trained nurse that Dr. Huffman sent. She came on the 2d day, the 21st of November. She stayed until the next day. Dr. Huffman came in the afternoon. Mac got up and went to the bathroom. Then he wanted to go to Walter Reed and Dr. Huffman said he would be better off in a hospital. I said to Dr. Huffman on the morning of the 21st, 'Mac wanted to see his lawyer.' Dr. Huffman said he could see no objection to that so I called Mr. Marshall's office about 10 A. M. and said 'Mac wants to talk to you.' Marshall came down about noon and went into Mac's bed-

room. I did not go in and don't know what they talked about. Marshall talked to Mac about fifteen minutes and I was in the kitchen and down in the yard with my dog. Marshall then left and did not tell me what he was there for. The next time I saw Marshall he had two men with him, a Mr. Briscoe and another man. This was on the 22d day of November and after they were gone Mac told me he had made a will. Mac was feeling a great deal better that day. Made arrangements to go to the hospital on the 24th. I did not ask Marshall and the two men what their business was with Mac. I went to the hospital with Mac in an ambulance. He was just about in the same condition then as when he got home from Reno. I took the mail out to the

hospital. His checks were sent to my house. I signed
42 the checks after the power of attorney was executed.

I think I signed two. He was better but the doctor didn't want him to be bothered. I did not present power of attorney but told Marshall to prepare it. The only purpose of the power of attorney was to authorize me to sign checks. I don't know why to endorse notes was put in there. I did not tell Mr. Marshall to do it.

"I first met Mr. Hudson, my attorney, the next day after Mac's death. Marshall has been my attorney since 1929. He represented me in the death of my son and other litigation, and Mr. Marshall introduced me to Mr. Hudson. I might have introduced Mac to Mr. Marshall. As soon as Mac died I called up the undertaker and then Mr. Marshall. I did not know that Mr. Marshall had Mac's will. I called him as only some one I could call on for help. Mac and I bought the auto together. We bought it in our joint names in 1928. I notified Bernadette that her father was in the hospital as soon as I could get to a phone, so she came over to my house on the morning of the 25th immediately after I phoned her.

"I was to take care of the house and he was to pay the rent, grocery bill and when he came back from Reno he would pay. At Shady Side, he paid me nothing because he didn't have the money. He would sit in the car and I would go in and get the money and give it back to him. I didn't say I cashed checks and paid his bills. I paid out what he gave me. He owned no interest in the Shady Side, Maryland house. No one lived with us there. We had company.

When he went to Reno the auto stayed over at Joe Monaco's. I went over and got it and put new tires on. The car was over at Monaco's during the months of October, November, and December. In December I got the car and used it up to this winter. I bought the car with my money. I don't remember what bills he paid in Maryland. I don't know if he had any money on him when he died. Mac cashed checks on the morning of November 6th, 1933 at 9th and G Streets, N. W. I was sitting in the auto and he went into the bank himself. I don't know the amount. He got \$100 per month from the Police Department, \$58 from the Government which was cut to \$30 I heard him say.

43 Major Blankford, speaking of the power of attorney, said to Mac, 'I want you to sign on line and not above the line.' Mac was not in a coma when he first signed the power of attorney. Marshall was there when the power of attorney was signed and took the paper away with him. The next time I saw it was when I had a check. I went to Marshall's office and asked him just what the power of attorney meant and he said it meant that I could cash Mr. McDermott's checks.

"Mac had quite a number of visitors at the hospital—men from his lodge. I don't know how many but quite a good many came to visit us at 1420 R Street. Mac told me to keep all the letters he got as I might need them some time so I kept them. James and Mrs. McDermott came to my house in 1927. I have heard Mrs. McDermott nag at Mac about money. This was after the Canada trip. He didn't buy auto especially to go on Canada trip. I did not call him at his house. He never bought me a compact and some flowers and no Christmas presents. Were not affectionate towards each other. He named me beneficiary under the police policy. He said, 'Pet, let me have Metropolitan Relief as I want to see about it,' but he didn't see about it until after he came back. He got the papers from Bernadette the first part of October. She was willing to give him the papers. I told him he could give my piano to Bernadette—maybe she will take it for the debt. I told her it was my piano and that I was giving it to Mac so he could give it to her. She said she would have to ask Joe. He said, 'I didn't know Bernadette had any hard feelings about that piano.' He knew that she didn't feel kindly. One morning he said 'I want you to go somewhere with

me.' We drove to Police Station and he said he wanted to see about Metropolitan Relief money. I went in with him and he said, 'Mr. Crawford, I want to find out about the Relief Money. My daughter says it has gone into receivership.' Crawford said it is as good as gold. Then Mac said, 'I want to change the beneficiary—make it to Mrs. Simpkins, my housekeeper.' They changed the
44 paper. Mac signed it, Crawford and an officer. I asked him 'Why did you do that?' and he said 'Bernadette and I had understanding. She was to give you half but since that letter I don't know whether she will do it and now I feel better satisfied.' I got everything Mac had. He didn't have anything but wearing apparel. I only endorsed two checks under the power of attorney. After that Mac endorsed them."

The caveatee to further sustain the issue, introduced **Carl A. Marshall**, who, being duly sworn, testified that he is an attorney and that he had known and represented the deceased since 1931. Mrs. Simpkins introduced me to McDermott. I met him through her but don't know whether she introduced me.

Witness gave the deceased advice numerous times on his difficulties with his wife and that at the deceased's request witness advised him that the best way for him to get a divorce was to go to Virginia or Nevada, and establish a residence. Witness stated deceased moved to Virginia, but did not remain long enough to establish a residence and later deceased in October, 1932, went to Reno, Nevada, to obtain a divorce but was taken sick and returned Nov. 20, 1932 without obtaining a divorce. Witness stated that on November 21, 1932 the deceased phoned him requesting him to come up to see him about a will and witness immediately went up to see deceased who gave him instructions as to what he wished in his will of which the witness made note. Witness stated that there was no one present at this conference except witness and deceased. Deceased asked me if he could transfer his house to Mrs. Simpkins, by will, and being advised that he could the deceased instructed the witness to draw up a will. Witness stated that as he had other engagements that evening, he took the information and instructions as to the will to Raymond M. Hudson and had him draft the will which is the one in issue.

Witness stated that on November 23, 1932, that he took the will and the two witnesses, Biscoe and Armally to the apartment on R Street and "we were admitted by Mrs. Simpkins, but she did not go into the deceased's bedroom with us; the deceased was in bed and took the will and read it and then he signed it and handed it to one of the
45 witnesses who were both present when he signed it, and the deceased declared and published it as his last will and testament and requested the witnesses to sign it as witnesses of such, which they both did in his presence and in the presence of each other; the last witness then handed the will to the deceased and they went out of the room and then the deceased handed the will to me and requested me to keep it in a safe place which I did until his death."

The witness stated he never mentioned or discussed the will to Mrs. Simpkins until after the death of the testator. "I first mentioned the will to Mrs. Simpkins the night of McDermott's death when we came back from Maryland. I told her she would be made executrix and that some provision had been made for her, and when I then told her of the will she seemed surprised and asked me what she should do and I replied that she should have it admitted to probate." Witness stated that when he took charge of the deceased's troubles with his wife he found the deceased was paying \$5.00 a month more than the agreement called for and witness advised him of this and he stopped making additional \$5.00 payments. Witness stated that on deceased's instructions, he offered to convey the home to Mrs. McDermott, but she refused it several times; some of the negotiations were with the attorney, Hill. Witness stated that the deceased began making these payments under the agreement through the witness when he left for Reno, in October, 1932. Witness stated that some time after deceased left the hospital he came to the witness' office and asked to see the will but after reading it the deceased stated he was satisfied with the will but he wanted to know how to transfer the Metropolitan Police Relief certificate to Mrs. Simpkins as he wanted to give that to her because of all the kindness and attention that she had given him; witness advised deceased that the Association had a regular manner for such assignments of the certificate and to take it to the Association and they would

transfer it in the regular form. Witness stated that deceased never discussed his personal or business affairs in the presence of Mrs. Simpkins or anyone else; some
46 times Mrs. Simpkins came to the office with the deceased, but she always remained in an outer office and was never present in any of the conferences. Witness stated that all of the letters introduced as Exhibits with the envelopes were found in the papers of the deceased after his death and he took charge of them. Witness identified a letter, Exhibit "H", from Flynn, attorney for Mrs. McDermott, dated April 20, 1933, and after deceased came out of the hospital, which threatened "steps at law" unless he immediately made payments. Witness identified a letter from Doyle, attorney for Mrs. McDermott, dated December 10, 1932, Exhibit "M", commanding monthly payments of \$50.00 for December, 1932. At the time, the wife knew the deceased was in the hospital. Witness identified a letter from Hill, attorney for Mrs. McDermott, Exhibit "O", dated August 24, 1933, from the statements of which, and from statements made by Hill to the witness, he was given to understand that if the deceased did not catch up the payments quickly, that there would be criminal proceedings against the deceased and that the witness took the question up with the Assistant United States Attorney to prevent any undue action. Witness introduced receipts showing \$28.00 paid to the Building Association for deceased, January 7, 1933; \$50.00 for Mrs. McDermott, November 7, 1932, and stated that notwithstanding the deceased's sickness in hospital for several months, and at the middle of July, 1933, the deceased was only behind in payments to his wife, being July, 1933. Witness identified and introduced a letter from Hill, attorney for Mrs. McDermott, Exhibit "Q", dated September 5, 1933, asking that Mr. McDermott be brought back to the District of Columbia to accept service of summons, and stating that "if we are forced into another jurisdiction we shall most certainly ask the court for ne exeat." Witness testified that Mrs. Simpkins phoned him to prepare the power of attorney Caveator's Exhibit "3", which he prepared and took to the hospital and gave to the deceased and he read it and stated that that was what he wanted, and then they called Mr. Blandford, the notary, and a Red Cross nurse as a witness, and the deceased signed it. I

noticed Mac's signature was part on and part above the line. I don't remember just what was said but Mac was requested by the notary to sign it again. The notary
47 suggested that they wait a few minutes and let him sign it again, which was done and then the notary certified the acknowledgement; witness testified that the day the deceased died he received a phone call from Mrs. Simpkins to go down to Maryland to bring her back. Witness stated that after they returned that evening Mrs. Simpkins phoned Bernadette Monaco and she came to the office where they were making funeral arrangements.

Witness stated that he received the power of attorney, Exhibit "K" sent by deceased with the request that he get Mrs. McDermott to sign it so that the deceased could get a divorce and he took the power of attorney to Mrs. McDermott, but she without deciding on the matter referred him to her attorney, Michael Doyle and he took the power of attorney and left it with Doyle telling him what Mrs. McDermott stated and on December 10, 1932, Doyle wrote witness Exhibit "I" returning the power of attorney and stating that he did not represent Mrs. McDermott in the divorce proceedings.

Cross-examination:

Witness testified that McDermott had only paid him \$10.00 on account of services which were rendered but that he had a bill against the estate for services. Witness stated he had attended to some legal business for Mrs. Simpkins. Witness testified that he graduated from George Washington University Law School in 1923, and has been engaged in the practice of law since 1924 and has drawn probably twenty-five wills and that this one was not a particularly difficult one. Witness testified that he had received a letter from the deceased while he was in Reno and that he had also received from the deceased in Reno the power of attorney, Exhibit "K" which the deceased wished his wife to sign so that he could get his divorce, but he could not find the letter that came with the power of attorney and the other letter was undated and the power of attorney had on it, the — day of November, 1932. I saw Mr. McDermott the day before he signed the will. He called me and I went up
and got the data. Both Mr. McDermott and Mrs.
48 Simpkins called me. McDermott wanted the will written right away. I called Mr. Hudson to do it

because I was busy. I saw Mr. McDermott in the bedroom when I took up the will. Phone was in a little hall. He was a right sick man. I never saw a trained nurse and didn't see Dr. Huffman and Mr. McDermott read the will himself. I think Mr. Aramal was in the room. The other witness was in the other room. My office is at Vermont at L. Mr. Hudson's office is at 14th and H. I took will to my office and didn't see Mrs. Simpkins until about two weeks afterwards. I went by Mr. Hudson's office and got the will or he might have sent it to my office.

The caveatee here rested.

Caveator's Rebuttal.

The caveator in rebuttal to sustain the issue introduced **Thomas S. Blandford**, who being sworn testified that he took the acknowledgement of the deceased to the power of attorney, Caveator's Exhibit "3", but he did not recall the circumstances except that the deceased knew what he was doing and did it of his own voluntary and free will. Witness stated that it often happens that when a patient has been in a clinic, he does not write his name plainly and witness required a second signing.

Cross-examination:

Witness did not remember seeing Marshall there. Witness stated after the first signature by McDermott he waited five minutes so that the deceased could write his name more plainly. Witness stated that Mrs. Simpkins and Mrs. Monaco were there, but witness does not remember that Mrs. Monaco asked that they wait a while for the second signature. Witness would not refuse to take acknowledgements merely because name was not written on the line.

Mrs. Maggie McDermott, being recalled, stated that she now receives \$60.00 a month pension and \$30.00 per month from the Government on account of the World War, which was stopped July, 1933, with nothing on account of the Spanish American War, and that she receives now \$60.00 a month from the Metropolitan Police Relief Association.

Witness stated she also has a pending application
49 for a \$15.00 pension.

The caveator to further sustain the issue introduced **Joseph Monaco**, who, being sworn, testified that he had never been in Mrs. Simpkins' apartment and that when the Reno divorce trip was discussed, he did not tell deceased in the presence of Mrs. Simpkins that he thought the deceased should go to Reno and get a divorce. Witness is the husband of Bernadette Monaco.

The caveator to further sustain the issue introduced **Howard E. Crawford**, who, being sworn, stated he is one of the trustees of the Metropolitan Police Relief Association and that he knew the deceased and Mrs. Simpkins and recalled the assignment of the certificate from McDermott to Mrs. Simpkins and produced it. Witness stated that the stenographer prepared it as the deceased asked the witness to have it prepared. Witness stated that Mrs. Simpkins was with the deceased when he came in. Witness
50 stated deceased handed it to Mrs. Simpkins and asked her if it was all right and she said, "Yes". Whereupon deceased executed it. Witness stated that Mrs. Simpkins did not make any request for the certificate to be assigned. The caveatee objected — each question and answer of this witness and moved to strike them all out for the reason that it was not part of the *res gestæ* and was nearly a year after the will was executed and was immaterial and irrelevant which objection and motion the Court overruled and the caveatee excepted which exception was allowed. The caveator to further sustain the issued recalled Bernadette Monaco who stated that Mrs. Simpkins phoned her at 11 P. M. on November 24, 1932, that the deceased had been taken to Walter Reed Hospital that evening. Witness stated she never heard her father discuss the Reno divorce with Mrs. Simpkins. Witness stated she did not see Marshall at Walter Reed Hospital but that the power of attorney was given to Mrs. Simpkins and she put it in her pocketbook.

Caveatee's Rebuttal.

The contract and title papers for the auto showing it stands in the name of the deceased and the caveatee was admitted in evidence.

Both sides closed. Thereupon the caveatee renewed her different motions to strike out certain evidence and also

moved the Court to strike out all the evidence as the fourth issue did not constitute a cause of action and because there could not be undue influence sufficient to invalidate a will unless there was fraud, coercion, or mental incapacity, and as the issues 1, 2, 3, and 5 involve fraud, coercion and mental incapacity, had been withdrawn by the caveator or stricken by the Court that the caveator had thereby put himself out of Court, and because the fourth issue was not pleaded, which motions the Court overruled to which ruling the caveatee excepted which exception was allowed. Thereupon the caveatee moved the Court to direct a verdict in favor of the caveatee on the fourth issue, which motion the Court denied to which ruling the caveatee excepted to which exception was allowed.

51 Thereupon before the argument of the case to the jury the caveator requested the Court to give his prayer No. 3, which is as follows:

Caveator's Prayer No. 3.

“The jury are further instructed that as a matter of law that it is not necessary that there be direct proof of undue influence in the execution of a will, but if they find that confidential relations existed between the testator and the beneficiary under this will, it is for them to infer from all of the evidence before them whether or not the execution of the will of testator was the result of improper inducement or fraud.”

To which prayer the caveatee objected because it raised a question of fraud which had been withdrawn from the case, because it assumed and inferred facts which had not been proven nor was there any evidence of, and permitted the jury to assume and infer such facts, and because confidential relations (there is no proof of same) do not raise presumption of a fraud, and because undue influence can not be presumed, nor can there be undue influence without improper inducement or fraud; thereupon the Court stated it would modify the prayer and give it as modified and did give it, as modified, as follows:

“The jury are further instructed that as a matter of law

that it is not necessary that there be direct proof of *undue influence* in the execution of the will, but such undue influence may be established by and inferred from the facts and circumstances in evidence."

To which prayer so modified and given, the caveatee objected because there can be no undue influence without improper inducement, coercion or fraud and because there was no evidence of same and because there was no evidence of any undue influence, and because the Court had announced at the close of the caveator's evidence that no evidence as to coercion, fraud, or improper inducement would be admitted, which objection the Court overruled and the caveatee excepted which exception was allowed. Thereupon after argument by counsel before the jury the Court instructed the jury as follows:

52

Court's Charge to Jury.

This proceeding is commonly referred to as a will contest. Hugh McDermott, the testator, died on the 8th day of November, 1933. He left a will dated November 23d, 1932, which was filed in the office of the Register of Wills on the 9th day of November, 1933, for the purpose of having the same probated. In such case the law permits any person interested to file what is known as a caveat, which is a written objection to the probate of the will and sets forth the grounds on which such objection is based.

The law further provides that when such caveat is filed and any party on either side of the contest desires that the questions raised shall be passed upon by a jury, the Justice of the Court, who is sitting in probate, frames what are called issues; that is, brief statements of the points to be submitted to the jury for its determination. These so-called issues are in the form of questions, and upon the answer to them by the jury depends the admission of the will to probate or its rejection as the last will and testament of the testator.

In this case James H. McDermott has filed the caveat, and he is, therefore, called the caveator. Katherine R. Simpkins, who is nominated as the executrix of the will, is here to sustain such will as the last will and testament of Hugh McDermott, and is known as the caveatee.

For the purposes of this trial, James H. McDermott, the caveator, has been aligned as the party plaintiff, and Katherine R. Simpkins, the caveatee, has been aligned as the party defendant. The parties will be referred to as plaintiff and defendant.

Five issues have been framed and, of these, issues numbered one and three will be answered by you in the affirmative. Issues No. 2 and 5 have been withdrawn. As to issue four, you will determine this issue from all the facts and circumstances in evidence. Issue number four reads as follows:

“Was the said paper writing dated the 23d day of November, 1932, obtained or the execution thereof procured from the said Hugh McDermott, deceased, by undue influence of Katherine R. Simpkins, or any other person or persons?”

Here the question for the jury to answer is whether or not this will was obtained or the execution thereof procured from Hugh McDermott, the testator, by the undue influence of Katherine R. Simpkins or any other person or persons.

It is no part of your responsibility to pass judgment upon the wisdom of the provisions of the instrument here in controversy, alleged to have been executed by Hugh McDermott on *on* the 23d day of November, 1932. The right of making a will and disposing of one's property as he pleases, even to gratify partialities or prejudices or whims, is among the well recognized rights of the citizen secured by the law. The law permitted Hugh McDermott to make this will according to the impulses of his own judgment, provided that at the time of executing or acknowledging the will, he was not induced by fraud, undue influence or other illegal considerations to make the will.

53 The plaintiff by this caveat alleges that such will was procured by the undue influence of Katherine R. Simpkins or some other person or persons.

The burden of proof is upon the plaintiff to establish to your satisfaction by a preponderance of the evidence that the will was obtained by undue influence practiced upon the testator by Mrs. Simpkins or some other person or persons.

The question presented for the consideration of the jury is *not* whether the will was obtained or procured by the ex-

ercise of *influence*, but whether it was procured by the exercise of *undue influence*. There are many influences which may be exercised upon the mind of a testator which are entirely proper and legitimate, and although the testator may voluntarily yield to them, the fact that the testator does so yield has no effect upon the question of the validity of the will. It is only such influence that the law terms "undue influence" that can invalidate a will.

Undue influence is influence which substitutes the wishes of another person for the judgment of the testator. No matter what persuasion or argument may be made to influence the mind of the testator to cause the making of a will in a certain manner, so long as the making of the will is the result of the exercise of the testator's own free judgment, the will is valid, although the testator may have been importuned. It is only when the influence is of such a nature as to dominate and control the testator's judgment, so that it substitutes for the testator's judgment and free mental action, the judgment and wishes of another, that influence becomes undue influence.

So you are instructed that the fact, if it be a fact, that the will in controversy was executed as the result of the influence or suggestion of Katherine R. Simpkins or of any other person or persons, is not sufficient to invalidate it. The law permits reasonable suggestions or arguments to a person about to make a will, but frowns upon and stamps with its disapproval undue influence. By undue influence it is meant such influence as amounts to coercion, imposition, unreasonable importunity or excessive persuasion, whereby the free agency of the testator is destroyed so that the will executed is not the free and voluntary act of the testator, but of some other person. Influence gained by affection, kindness, attachment, services, or other proper means is not undue influence within the meaning of the law.

I now read Caveator's Prayer No. 3, which I have granted, as follows:

"The jury are further instructed that as a matter of law that it is not necessary that there be direct proof of *Undue influence* in the execution of the will, but such undue influence may be established by and inferred from the facts and circumstances in evidence."

In determining whether or not the testator was unduly influenced in the making and execution of the will on the 23d day of November, 1932, the jury may take into consideration the age, the experience, the occupation and the condition of the health of the testator at or about the time of the signing and execution of the will; his relations with the beneficiary, Mrs. Simpkins, their nature, character and extent; his relations with his widow and children and the nature, character and extent of such relations; the separation agreement between him and Mrs. McDermott
54 executed in 1927, and their relations both before and after execution of that agreement; the terms and provisions of the will in evidence and all other facts and circumstances in evidence bearing upon this question of undue influence. If you find from preponderance of the evidence that the will in evidence is not the result of the exercise of the testator's own free judgment and mental action, but is the judgment and wishes of Mrs. Simpkins or any other person or persons, or the result of coercion or imposition practiced by Mrs. Simpkins or any other person upon the testator which destroyed the free agency of the testator in making and executing the will, so that it is not his free and voluntary act, then your answer to issue No. 4 should be Yes.

On the other hand, if you are not so convinced by a preponderance of the evidence, or if you believe that this will is the result of the exercise of the testator's own free judgment and mental action, and not the result of undue influence, as I have explained that term, then your answer to the issue No. 4 should be No.

I have said that the burden of proof is upon the plaintiff to establish undue influence by a fair preponderance of the evidence.

By "preponderance of evidence" is not meant the mere greater number of witnesses upon the one side or the other, but it means that evidence which is most convincing and satisfactory to the minds of the jurors. In determining upon which side the preponderance of the evidence is, the jury may take into consideration the opportunities of the several witnesses for seeing and knowing the things about which they testify; their conduct and demeanor while testifying; their interest, if any, or want of interest, if any, in the result of the suit and the probability or improbability

of the truth of their several statements. It is from these and all the facts and circumstances in evidence that you determine the weight or preponderance of the evidence.

It is your sole and exclusive function and duty as it is your responsibility to determine the facts that have been established by the evidence and it is especially your province to determine the credibility of the witnesses and the weight to be given to their testimony.

You will now retire to jury room, elect your foreman and deliberate upon your verdict."

Thereupon the jury returned its verdict and answered the fourth issue in the affirmative.

Thereafter the caveatee filed three motions as follows:

- (1) To set aside the verdict and grant a new trial;
- (2) To arrest judgment and admit will to probate, and
- (3) To enter judgment in favor of the caveatee notwithstanding the verdict.

Which said motions were each respectfully overruled and denied on June 4, 1934, to each of which ruling the caveatee excepted which exceptions were allowed. Thereupon on June 4, 1934, the Court entered a judgment denying the prayers of the caveatee, to probate and record the paper writing, dated November 23, 1932, as the last will and testament of Hugh McDermott, deceased, to which ruling of the Court the caveatee excepted which exception was allowed.

55 The foregoing is the substance of all of the testimony bearing upon the exceptions herein reserved on behalf of the defendant.

And thereupon, and as all of said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the Court, before the jury retired to consider of its verdict, and because the matters and things hereinbefore recited are not matters of record, in order to make the same a part of the record herein, which is hereby ordered, so that the defendant may have his case reviewed on appeal, the defendant, by its attorney, moves the court to sign and seal this, its Bill of Exceptions, to have the same force and effect as if each and every one of said exceptions had been

separately signed and sealed which motion is granted by the Court; and thereupon the defendant tenders this, its Bill of Exceptions, and requests the court to sign and seal the same, which is accordingly done, now for then, this 6th day of December, 1934.

O. R. LUHRING,
Justice.

Satisfactory to me.

RAYMOND M. HUDSON,
V. O. HILL.

(Endorsement:) Bill of Exceptions. Filed July 23, 1934. Theodore Cogswell, Register of Wills, D. C., Clerk of Probate Court.

56 United States Court of Appeals for the District of
Columbia.

October Term, 1934.

Original No. 2353.

Administration 45,823.

In re Estate of HUGH R. McDERMOTT, Deceased.

On consideration of the petition for extension of time to file the record in the above-entitled cause, It is ordered by the Court that the time be and it is hereby extended to and including December 6, 1934.

Per Mr. Chief Justice MARTIN.

December 14, 1934.

A true copy.—Test:

[Seal United States Court of Appeals for the District
of Columbia.]

HENRY W. HODGES,
Clerk.

By MONCURE BURKE,
Deputy Clerk.

57 [Endorsed:] Original No. 2353. United States
Court of Appeals for the District of Columbia. Or-

der Extending Time to File Record. United States Court of Appeals for the District of Columbia. Filed Dec. 14, 1934. Henry W. Hodges, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6367. Katherine R. Simpkins, Appellant, vs. James H. McDermott. United States Court of Appeals for the District of Columbia. Filed Dec. 6, 1934. Henry W. Hodges, Clerk.

(5857-C)

FILED MAR 6 - 1935

BRIEF FOR APPELLANT

Henry M. Hodges
CLEP

United States Court of Appeals
for the District of Columbia

JANUARY TERM, 1935.

No. 6367.

KATHERINE R. SIMPKINS, APPELLANT,

vs.

JAMES H. McDERMOTT, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

RAYMOND M. HUDSON,
MINOR HUDSON,
CARL A. MARSHALL,
Attorneys for Appellant.

United States Court of Appeals for the District of Columbia

JANUARY TERM, 1935.

No. 6367.

KATHERINE R. SIMPKINS, APPELLANT,

vs.

JAMES H. McDERMOTT, APPELLEE.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Supreme Court of the District of Columbia denying probate of a will and sustaining a verdict vacating the will of Hugh McDermott, deceased, father of the appellee, who is caveatee.

Appellant Simpkins, the executrix and sole beneficiary in the will, subject to the dower rights of the widow, filed a petition for probate, naming the widow and four children of the deceased, all of whom were alleged to be of age and the two girls married, but one petition of the caveator alleged that the son Edward lacked a few months of being twenty-one. The will, dated November 23, 1932 (R15), offered for probate states, "the said

Katherine R. Simpkins having for many years been my friend, housekeeper and nurse". (R16) and the will also states:

"During my lifetime I have given to each of my children all that I think is proper and all that I wish to give each of them and I have always provided abundantly each month for the support of my family; all of the children are now grown."

The residence is practically the entire estate of deceased and he offered to convey it to his wife nearly a year after date of will.

In March, 1927 (R19), the deceased and his wife entered into a legal separation agreement whereby he paid her \$75.00 per month and gave her the use of the home, which payments he kept up until after the will was executed and to within a few months of his death.

Appellee filed a caveat (R3), alleging the will was invalid because the deceased was not of sound mind and memory and because the will and the signature thereto were procured by the fraud and coercion of appellant or other persons. It does not allege that it was procured by undue influence without fraud or coercion. Appellee is a married son owning a home and a member of District Columbia Fire Department.

Appellant answered the caveat (R5) denying the fraud or circumvention and denying that deceased was of unsound mind and memory.

The Court framed five issues for trial (R6). The first and third issues were the formal issues of execution, the second issue involved mental capacity; the fourth issue involved a so-called "undue influence" without any element or question of threats, coercion, fraud, or duress, which is something unknown to the Federal Courts and which was not alleged in the caveat (R7). The fifth issue involved undue influence with the elements of coercion, fraud, and duress, which is the only

character of undue influence recognized by the weight of authority and especially in this District and other Federal Courts.

The appellant proved the will and the execution thereof by the two witnesses thereto (R14-15) and rested.

The appellant at the close of the opening statement of counsel for the caveator (R17) moved for a directed verdict (R19). The opening statement of counsel does not contain one single fact that constitutes fraud or proves fraud or that the deceased was mentally incompetent; the opening statement is almost entirely argument and conclusions of law.

The Court overruled the appellant's motion for a directed verdict on the opening statement and exception was allowed (R19).

At the close of the appellee's testimony the appellant renewed her motion for a directed verdict (R35) and the Court indicated it would direct a verdict in favor of the caveatee on issues 1, 2, 3 and 5, but the caveatee, with the consent of the Court, withdrew issue 2 involving mental capacity and issue 5 involving fraud and coercion. The Court directed the verdict in favor of the appellant on issues 1 and 3, but denied the motion to direct a verdict on issue 4, to which the appellant excepted (R35).

The appellant then renewed her motion to strike out different parts of the evidence and also moved to strike out all the evidence as the 4th issue did not constitute a cause of action because there could not be undue influence sufficient to vacate a will under the law unless there was coercion or fraud; because the issue 5 involving fraud and coercion had been withdrawn; because the 4th issue was not pleaded and was not properly an issue that could be submitted to the jury, each of which motions the Court denied and exception was allowed (R35).

The Court then announced that no evidence would be required or permitted as to issues 1, 2, 3 and 5 (R35). While the caveatee was presenting testimony some witnesses, who were summoned to testify under issues 1, 2,

3, and 5, appeared and appellant's counsel informed the Court thereof and asked if the Court still adhered to its announcement that no testimony would be permitted as to issues 1, 2, 3 and 5 and should the witnesses be retained or released. The Court announced adherence to its ruling and directed the release of the witnesses. (R35.)

At the close of the appellant's testimony and rebuttal testimony (R49) the appellant renewed her different motions to strike out certain parts, and all, of the evidence for the same reasons as given before and renewed her motion for a directed verdict in favor of the caveatee, each of which motions were denied and exception allowed.

Thereupon, the appellee asked for prayer No. 3, which the appellant objected to (R49) and which the Court modified and granted over the objection and exception of the appellant (R50). The prayer as offered involved the element of fraud and improper inducement and as modified and as granted was without such element and was not a correct statement of the law.

The Court's charge to the jury (R50) was directed solely to the 4th issue and it contained the modified prayer No. 3, which does not involve an element of fraud or coercion, but the Court in the preceding paragraph stated that the undue influence condemned is such influence as amounts to coercion, imposition, unreasonable importunity, and excessive persuasion, which was not applicable to the 4th issue and would have been applicable to the 5th issue, which was withdrawn, and it was confusing to the jury. In the next paragraph (top R53) the Court tells the jury to consider the condition of the testator's health although issue 2 involving mental incapacity was withdrawn and this was confusing to the jury. At the end of the same paragraph (R53) the Court instructed the jury that if there was coercion or imposition practiced by appellant then they should answer the 4th issue "Yes", which charge would only be

applicable to the 5th issue which the jury was told was withdrawn, and this was confusing to the jury.

The jury's verdict answered the 4th issue in the affirmative.

The appellant filed three motions as follows (R54):

“(1) To set aside the verdict and grant a new trial;

(2) To arrest judgment and admit will to probate, and

(3) To enter judgment in favor of the caveatee notwithstanding the verdict.”

Each of these motions were denied and exception was allowed. By an inadvertence these motions were not copied into the transcript, but they are printed in this brief so that this Court can see the points that were raised and argued before the lower Court. They are as follows:

“Now comes the caveatee and moves the Court to set aside the verdict and grant a new trial or to enter judgment in favor of the caveatee establishing the will of the testator for the following reasons:

I. Because the Court should have directed verdict for caveatee.

II. Because the Court granted an erroneous instruction at request of caveator and the charge was, as a whole, too general, too indefinite, and not made applicable to any facts, but gave the jury the impression that inferences alone were sufficient to set aside a will.

III. Because verdict was contrary to law.

IV. Because verdict was contrary to evidence.

V. The Court erred at end of caveator's evidence when after stating the Court would direct a verdict for caveatee on the First Issue whether the will involved was testator's last will, on the Second Issue, whether testator was of sound and disposing mind, on the Third Issue, whether will was duly executed and attested as required by law, and on the Fifth Issue whether will was obtained by undue influence, practiced by coercion, fraud, or duress, as there was no evidence to sustain any of them and caveator thereupon voluntarily withdrew Issues Nos. 2 and 5 and the Court then denied a directed verdict on all the Issues, or the whole cause, because (a) the so-called Fourth Issue whether there was simply undue influence, rather influence devoid of coercion, fraud, duress or threats, was not alleged, charged or pleaded by Caveator consequently by his withdrawal and admission that there was no evidence to sustain the Second and Fifth Issues. (b) Every pleaded question of undue influence was thereby put out of Court and as the Court dismissed the First and Third Issues the whole case went out of Court and there was nothing to submit to the jury.

VI. The Court erred at end of Caveator's evidence in not directing a verdict for Caveatee as there is no pleading whatsoever in the record to sustain a judgment on the verdict returned by the jury.

VII. The Court erred in holding at end of Caveator's evidence and again at end of all testimony, that there was any question of issue to go to the jury or to be decided by it after the Court had decided that there was no evidence of any undue influence by fraud, coercion, threat, or duress. And as on such ruling, Caveator had withdrawn such issues because influence of any kind without any of such elements named above is not a sufficient cause to overthrow a will of one fully capable of making a will as the Court had also ruled the testator was capable of making a will.

VIII. The Court erred in holding that the cause could go to the jury when there was not any proof of any one single act or fact that was undue

influence, or fact of undue influence, but only tended slightly, if any, to create suspicion of an inference, but not of the fact.

IX. Because the actions and verdict show the jury was prejudiced, which was partly due to indefiniteness and generalities of the Court's charge, to fact that Joe Monaco was permitted by Caveator's attorney to stay in courtroom while caveatee's witnesses testified, and he then was called to testify for caveator, to fact caveator's witness interfered with, and annoyed, caveatee when latter was testifying, to fact that caveator's attorney accused the son of caveatee's attorney of interfering with, and carrying messages between, witnesses.

X. The Court erred in not permitting introduction in evidence of Letter Ex. Caveatee No. "B" so as to leave to jury question of who wrote it and thereby denying caveatee the benefit of its contents.

XI. The Court erred in admitting 12/5/32 Power of Attorney and its history as not in anyway material or relevant to making will as it was later and undisputed evidence shows required by attending surgeon because of testator's high blood pressure and was approved by testator's daughter.

XII. The Court erred in admitting all evidence about change of designation of beneficiary in the Metropolitan Relief Association certificate, as it was long after execution of will and testator's daughter had been holding it, and had so acquired same for benefit of caveatee and daughter so testified.

XIII. The Court erred in denying caveatee's motion to strike out all testimony of matters subsequent to the execution of the will.

XIV. The Court erred in holding in effect that evidence, which some might think sufficient to create a suspicion of sexual intercourse between testator and caveatee, would justify the jury in vacating the will, when as a matter of law evidence of, or

the actual admission of, such sexual intercourse does not amount to such undue influence as will invalidate a will.

XV. The Court erred in holding that the beneficiary being housekeeper for testator cast the burden on her to disprove undue influence; it would also be erroneous even though it had been shown beneficiary drew the will bequeathing the property to her.

“Now comes the caveatee and moves the court to grant judgment in her favor establishing the will of the testator, notwithstanding the verdict of the jury on the issue submitted for the different reasons set out in the accompanying motion to set aside the verdict which are made a part hereof the same as if set out verbatim herein.”

The Court denied the motions and entered a judgment on the verdict and denied the probate of the will, to which ruling an exception was allowed (R54) and this appeal granted. All the grounds of each motion are relied upon in this brief.

The facts are few; deceased was married in 1901 and he and the son of the appellant, a grown man, were friends and when appellant first came to Washington in 1922 she met the deceased who was visiting her son. In 1923 the three of them took an automobile trip to Canada, each one paying his own expenses (R36). In 1927 the deceased entered into a separation agreement with his wife (R19), which gave her \$75.00 per month and the home. The will gave her her dower rights in the home and she and deceased knew that at his death she would get and she did get (R47) \$60.00 per month pension from the Government and an additional \$60.00 per month from the Metropolitan Relief Association and that she had a \$30.00 payment from the Veterans Bureau which they expected to continue, but which was stopped in July, 1933, nearly a year after the will was

executed. The widow admits (R23) that after July, 1933, nearly a year after the will was executed, the deceased offered to convey the home to her, but this she refused to accept, as the deceased was sick and could not keep up on his payments (R23), the \$450 Compensation Insurance Petition, par. 4 (R2) was paid to the widow.

The caveator was married and owned his own home, the two daughters were married and owned their homes, and the youngest son, Edward, was just under or just over 21 and his father had educated him and all the children and given them all he thought was necessary as stated in the will. One daughter, Margaret Casper, was married in 1926 and for 6 years from 1927 to 1933 only saw her father once and that was when he came at the birth of her baby and she only phoned him once in six years and that was after he came out of Walter Reed Hospital when she first heard that he had been sick (R31). Yet she saw her mother every week (R31).

The daughter, Bernadette Monaco, visited the deceased regularly (R25) and wrote him letters telling him of the antagonistic movements of the mother and sons (R27 bot.); her testimony and letters (R26) show that Mrs. Simpkins, the appellant, is a good and efficient housekeeper and nurse and prepared special diets for the deceased (R25, 26, 31 top) and her testimony and letters show her friendship for her father and the appellant and that she loaned the deceased money to go to Reno to get a divorce (R34 bot.). They negative any sexual intercourse between the appellant and the deceased and that there were bad relations between the two.

The deceased paid rent or rent and board at the appellant's apartment part of the time, but not all the time, and did not pay her for the nursing and special attention.

ARGUMENT.

UNDUE INFLUENCE WITHOUT AN ELEMENT OF THREAT,
FRAUD, OR COERCION IS NOT RECOGNIZED IN LAW AND IS
NOT SUFFICIENT TO INVALIDATE A WILL.

The case of *Mackall vs. Mackall*, 135 U. S. 168, upholds the contentions of the caveatee. The case originated in the Supreme Court of the District of Columbia and was appealed therefrom.

It is stated in the Syllabus:

“When a husband and wife separate, and one son remains with the father, taking his part, sharing his confidence and affection, and assisting him in his affairs, and the other children go with the mother, taking her part in the family differences, and this state of things continue for years, until terminated by the death of the father, it is natural and reasonable that the father, in disposing of his estate, should desire to specifically provide for the son who remained with him and took his part; and a deed made by him with this object, and under the natural influences springing from such relationship will be sustained, unless it be made further to appear that the son practiced upon the father imposition, fraud, importunity, duress, or *something of that nature*, in order to secure its execution.”

The Court said:

“In this respect we quote from the notes to the case of *Small vs. Small*, 4 Greenl. 220, reported in 16 Amer. Dec. 259, as follows:

‘Influence gained from kindness and affection will not be regarded as “undue”, *if no imposition or fraud be practiced*, even though it induce the testator to make an unequal and unjust disposition of his property in favor of those who have contributed

to his wants, if such disposition is voluntarily made. *Matter of Gleespin's Will*, 26 N. J. Eq. 523. * * * *Confidential relations existing between the testator and beneficiary do not alone furnish any presumption of undue influence*, *Lee vs. Lee*, 71 N. C. 139.

Nor does the fact that the testator on his death-bed was surrounded by beneficiaries in his will. *Bundy vs. McKnight*, 48 Indiana, 502. * * * Nor that the testator, an old and helpless man, made his will in favor of a son who had for years cared for him and attended to his business affairs, *his other children having forsaken him*. *Elliot's Will*, 2 J. J. Marsh. 340; S. C. Redf. Am. Cas. on Wills, 434. * * *

It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, *it should deprive age and infirmity of the kind ministrations of affection, or of power of rewarding those who bestow them.*' (All italics in this brief are supplied.)

This case is quoted in *Rood on Will*, Par. 178, and cites *Butler's Will*, 110 Wis. 70, 85 N. W. 678.

Towson vs. Moore, 11 Apps. D. C. 377, at 381, held that the undue influence necessary to vacate a will is a species of fraud, and the Court said:

"The controversy really turns upon the question of the alleged undue influence claimed on behalf of the appellants to have been exercised upon Mrs. Mary I. Campbell by her two daughters and their husbands; and upon the determination of this question depends the determination of the cause.

Undue influence, says the Supreme Court of the United States, in the case of *Conley vs. Nailor*, 118 U. S. 127, 134, 'the undue influence for which a will or deed will be annulled *must* be such that the party making it has no free will, but stands *in vinculis*. *It must amount to force or coercion, destroying free agency* (citing *Stulze vs. Schaeffle*, 16 Jurist. 909; *Williams vs. Goude*, 1 Hagg. Eccl. 577; *Armstrong vs. Huddleston*, 1 Moore P. C. 478).' In this same connection that court cites with approval the case

of *Eckert vs. Floury*, 43 Pa. St. 46, and the case of *Davis vs. Calvert*, 5 Gill. & J. 269, 302, in both of which the same doctrine is laid down in substantially the same language.

Undue influence, it is true, is in general a *subtle* influence, a *species of fraud*, difficult to be proved, and difficult to be disproved."

In *Eckert vs. Floury*, 53 Pa. St. 46, at 52 (which was quoted in *Conley vs. Nailor*, 118 U. S. 127), it was held and stated to be the Rule by Strong, J., that:

"Unless, therefore, there was some evidence tending legitimately to prove that *some fraud* had been practiced upon the testatrix at that time, or that *some misrepresentations* had then been made, or that *some physical or moral coercion* had been employed, such as to destroy her free agency, the *Court erred in submitting to the jury* the question whether undue influence had been exerted. It was inviting them to find as a fact that of which there was no evidence, and which the law as well as reason presumed had no existence."

The evidence of fraud in the last case was stronger than in the case at bar, but the Court held it was not sufficient to go to jury.

There must be fraud or fear present at the time of the execution, *McMahon vs. Ryan*, 8 Harr's (Pa.) 329 (20 Pa. St.) 329, cited in *Eckert vs. Floury*, above; *Moore vs. Blauvelt*, 15 N. J. Eq. 367, held that there *must be* threats, or coercion or fraud, there *were threats* and *misrepresentations*. Cited and quoted in Rood on Wills, Par. 176 n. 8.

In *Stant vs. American Security and Trust Company*, 23 App., D. C. at 29, the Court said:

"But again we fail to find here the proof that is sufficient in law to support the issue; and what the nature and amount are of such proof we learn

from the opinion of the Supreme Court of the United States in the case of *Beyer vs. LeFevre*, 186 U. S. 114, 46 L. Ed. 1080, 22 Sup. Ct. Rep. 765. *The fact of unlawful cohabitation, if such there be, is undoubtedly an element in the proof of undue influence. Davis vs. Calvert, 5 Gill & J. 269, 25 Am. Dec. 282; Dean vs. Negley, 41 Pa. 312, 80 Am. Dec. 620. But such fact without some proof, intrinsic or extrinsic, that it operated to influence the testator in making his will, can avail nothing, especially when it is so remote from the time of the making of the will as in the present case.*”

And again at 30:

“It is of no avail to say or to prove that Mary J. Brown, the granddaughter, caused an estrangement between the testator and his daughters which affected the subsequent will. Such estrangement might have been to some extent justified by the conduct of his daughters; and even if it was wholly without justification and the testator was guilty of a grievous wrong to them in the disposition which he made of his property, it would not follow that undue influence was exerted by Mary J. Brown to produce the result.”

The case of *Conley vs. Nailor*, 118 U. S. 127; 30 L. Ed. 112, a case from this Court, held that there must be such facts as prove fraud or coercion to justify setting aside a conveyance, and the Court said:

“This evidence is unimpeached and uncontradicted, and is conclusive. Upon the whole record, therefore, in our judgment, it plainly appears that Nailor was not intoxicated, and was mentally competent, when he executed the deeds which are the subject of this litigation.

* * * * *

“The next and last ground alleged for annulling the deeds is that Nailor was induced to make them by the *fraud and undue influence* of the defendant.

The ground upon which courts of equity grant relief in such cases is that one party, by improper means and practices, has gained an unconscionable advantage over another. The undue influence for which a will or deed will be annulled must be such that the party making it has no free will, but stands in vinculis. 'It must amount to force or coercion, destroying the free agency.' *Stulz vs. Schaeffle*, 16 Jur. 909. See also *Williams vs. Goude*, 1 Hagg. Eccl. 577; *Armstrong vs. Huddleston*, 1 Moore, P. C. 478. In *Eckert vs. Flowry*, 43 Pa. St. 46, it was said by Strong, J.:

‘Now, that is undue influence which amounts to constraint, which substitutes the will of another for that of the testator. *It may be either through threats or fraud*; but however exercised, it must, in order to avoid a will, destroy the free agency of the testator at the time when the instrument is made.’

* * * * *

Tested by these rules, the charge that the deeds in question were procured by the fraud and undue influence of the defendant is without support. On this branch of the case the plaintiffs have taken pains to prove that the defendant *treated Nailor with great kindness and with unremitting attention to his wants and comforts, but they have shown nothing else. There is an absence of proof that the defendant used either threats, stratagem, importunity, or persuasion to induce Nailor to execute the deeds.*”

The Court of Appeals in *Gibson vs. Collins*, 53 W. L. R. 82; 55 App. 262, followed, relied on, and quoted, the cases of *Conley vs. Nailor*, 118 U. S. 127, and *Mackall vs. Mackall*, 135 U. S. 168, and held that there must be fraud or coercion to constitute undue influence; that the facts did not meet the “heavy burden cast” upon the caveator, and the Court said:

“The record discloses, in our judgment, a most valuable and adequate consideration for this deed.

For 25 years defendant had lived with the mother and had contributed to her comfort and care.

* * * * *

“To hold, therefore, that his conveyance amounted to nothing more than a gift, is contrary to the record, and contrary to the agreement and understanding by the parties.

* * * * *

“ * * * , we think the record discloses conclusively that she was mentally competent to make the deed in question; that it was her desire to do so, not only to compensate defendant for services rendered prior to the death of the son, but to compensate her for the future care and comfort which she might afford.”

Moore vs. Moore, 47 App. D. C. 18, directed a verdict where there was not sufficient evidence of undue influence and it was held that payments to the beneficiary four days after the will and visits back and forth by him to the attorney was not sufficient evidence of undue influence. It was not even suspicious.

In *Hurd vs. Cramer*, 40 App. D. C. 349, it was held that gifts as grateful appreciation for care and attention are not invalid unless there is fraud and in that case there was fraud on account of false representations made by the beneficiary. This case cited at page 365, *Madre vs. Gaskins*, 39 App. D. C. 19, 28.

Madre vs. Gaskins, above, held that a deed of conveyance made by an aged and infirm woman, who was nevertheless of strong mind and positive convictions, and who had long been separated from her relatives, in favor of one living with her, in consideration of support and attendance for life, will not be set aside at the suit of an heir at law, in the absence of coercion.

Hagerty vs. Olmstead, 39 App. D. C. 170, held that it was improper to direct a verdict sustaining a will where a doctor and three others testified that the deceased was suffering from partial insanity and unsound mind.

In *Penn Mutual Life Ins. Co. vs. Union Trust Co.*, 83 Fed. Rep. 891, the Court, following *Mackall vs. Mackall*, above, held there must be fraud or coercion to constitute undue influence and that *facts must be proven* and the Court said:

“Finally, undue influence must be *proven by a preponderance* of evidence. It will not be presumed from conjecture or suspicion.”

* * * * *

“The *law requires proof of facts* when it is attempted to set aside an act apparently done deliberately and executed formally.”

An assignment procured by duress or undue influence will be set aside, but *there must be evidence of legal fraud*. *Pack vs. Wash. Life Ins. Co.*, 181 N. Y. 585; 74 N. E. 1122, aff. 91 N. Y. App. Div. 597; 87 N. Y. Supp. 210.

In *Freitag vs. Freitag*, 47 App. D. C., 45 W. L. R. 743, the Court said:

“Fourth: Was the execution by him of the purported will induced or procured through undue influence practiced upon him by Henry Louis Freitag and Hulda L. Saffron, or either of them, or by any other person or persons?”

“The Court was right in withdrawing the issue of undue influence from the jury (*Stuart vs. American Sec. & Tr. Co.*, 23 App. D. C. 25, 32 W. L. R. 38; *Beyer vs. Le Fevre*, 186 U. S. 114), unless a witness

should have been considered as some evidence upon that point. * * * The burden of proof of undue influence was on the caveators. They had failed to sustain this burden as we have shown, and, therefore, it was not incumbent upon the caveatees to offer any evidence upon that issue. * * * 10 Aulinf Case Law 888, Sec. 36; 16 Cyc., 1884; *Howe vs. Howe*, 199 Mass. 598; *His vs. Weik*, 78 Md. 482; *Kirby vs. Talmadge*, 160 U. S. 382. * * * *The law presumes that the caveatee had not used undue influence.*”

In *Beyer vs. LeFevre* 186 U. S. 114, reversing both the Court of Appeals and the Supreme Court of the District of Columbia (17 App. D. C. 238), the Supreme Court of the United States held and said:

“At the same time there has always been recognized the right and the duty of this Court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony it will set the verdict or report aside and direct a re-examination. And after having carefully examined the record in this case we are constrained to conclusion that *there is no testimony which justified the answer returned to the second question. On the contrary, if a will is set aside upon such a flimsy showing as was made of undue influence, few wills can hope to stand.*”

And, again, at 120:

* * * * *

“The only other witness, and the one upon whom the appellee substantially relies, is Fanny Perry, the servant. Now, in respect to her testimony, and indeed all the testimony in the case, it must be observed that there is not a syllable tending to show that *Louis Beyer, Junior, ever urged the testatrix to make a will, ever suggested or spoke to her in respect to the matter, and that all the connection he had with it was in response to requests to ascertain what would be the disposition of the property with-*

out a will, the validity of a will made on Sunday, and in suggesting the name of a lawyer to prepare the will and asking him to come. *Now, to find the will was obtained by undue influence on his part, when there is not the slightest syllable tending to show that he ever said or did a thing toward securing the execution of the will except at her request, is a proposition which cannot for one moment be entertained.*

* * * * *

And, again, at 120:

“But now, let us see what is the testimony which is claimed to show that Mrs. Johnson exercised undue influence. Mrs. Stone testified that she boarded with the testatrix for a couple of years (and that was a year or two before the death of the testatrix), and that *during that time, when Mrs. Johnson seemed displeased at something, she heard the testatrix say that ‘it was because she did not make a will and she never intended to make a will’.* Fanny Perry testified that she lived with the testatrix about three years prior to her death; that Mrs. Stone called at the home on the Sunday when the first will was executed, and she heard Mrs. Johnson say to Louis Beyer, Junior, ‘you go down stairs, and after you get the wagon hitched up take Mrs. Stone around to the Christian Endeavor encampment first, and then take her home; if she knows what is going on here she won’t leave here tonight *unless she gets a share in the profits*’; that she had heard Mrs. Johnson ask the testatrix to make a will, but the testatrix refused, saying that she would leave everything to Mr. Beyer just as it was, and for them to stay with him and treat him right, and when he died he would do right by them. To which Mrs. Johnson replied: ‘This is the way you are going to treat me after I have been working for you all these years, and this will be all the thanks I’ll get for doing it;’ that after the testatrix had taken to her bed she asked her to make a will, but she said she would not, but would leave the property to her husband, to which Mrs. Johnson

said: 'Yes, you will leave it to him, and he will sink it in a boat or rum mill;' and the testatrix replied: "Nellie, how can you talk about your uncle like that?' and also, 'Nellie, you are harassing me to death'. *Whereupon Mrs. Johnson said she would go if the will was not made and the testatrix replied: 'You have run Mrs. Stone out of the house to get something when I die. You said she was waiting for a dead man's shoes, but you are the one to catch it.'*"

The Court held this was not a threat, fraud or coercion sufficient to invalidate a will.

The Court further said:

"We put out of consideration the fact that Mrs. Johnson contradicts the witness and denies ever having urged the testatrix to make a will in her behalf or to make a will at all, and inquire *whether, giving the fullest weight to this testimony, it warrants a finding that the execution of this will was secured by undue influence. We are clear that it does not.*"

"In such actions the testator cannot be heard, and *very trifling matters* are often pressed upon the attention of the Court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the Federal Courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence *tending to show only a possibility of suspicion* of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor."

The two English cases, *Stulz vs. Schaeffle*, 16 Jurist 909, *Armstrong vs. Huddleston*, are approved, quoted, and cited in *Conley vs. Nailor*. Both held that it *must*

be by coercion, or fraud and in each of the cases there was more evidence and far stronger evidence seeming to prove coercion than there is in the case at bar, yet the Court in each case held there was *not sufficient evidence as a matter of law to invalidate the will*.

In *Riddle vs. Gibson*, 29 Apps. D. C. 237, at 248, Mr. Justice Robb stated the decision and the Rule:

“When a woman without children bequeaths the small estate she has been able to accumulate by her labor to her physician, who has been kind to her, to the exclusion of her brothers and sisters and other relatives who had been indifferent to her, she can not be said to have been suffering from an insane delusion. She ignored her relatives who had ignored her, and gave her property to those who had been kind to her.”

* * * * *

“The right of the trial court to direct a verdict, when the evidence introduced at the trial, with all the inferences that the jury may justifiably draw from it, is insufficient to support a verdict, is too well settled to admit of discussion.”

II.

ALL EVIDENCE NOT PART OF THE RES GESTAE OF EXECUTION
OF WILL SHOULD HAVE NOT BEEN ADMITTED OR
SHOULD HAVE BEEN STRICKEN OUT.

Monogue vs. Herrell, 13 Apps. 455, distinguishing *Throckmorton vs. Holt*, 12 App. D. C. 552, which was reversed in *Throckmorton vs. Holt*, 180 U. S. 552, held a trial court properly directs the jury to return a verdict sustaining a will, attacked as having been made under

duress and undue influence and as having been revoked or annulled, where its due execution and the fact that the testator knew its contents are admitted, and aside from the fact that the testator was 85 years old when he made the will, and it contains an *unequal distribution* of his estate among his children, there is *nothing to raise the slightest suspicion of unfairness*.

It also held where a will is attacked as having been made under duress and undue influence, but its due execution and the fact that the testator knew its contents are admitted, declarations by the testator of his intention to change his will and make a new one, are inadmissible, in the absence of direct proof of fraud and undue influence; distinguishing *Throckmorton vs. Holt*, 12 App. D. C. 552.

Throckmorton vs. Holt, 180 U. S. 553; 45 L. Ed. 664, holds that declarations and letters of one whose alleged will is attacked as a forgery, when not part of the *res gestae*, are not admissible, whether made before or after the date of the will, to show the improbability of his making such a disposition of his property as that which is in question.

It held also that improper evidence afterwards withdrawn affects the jury sufficiently under present conditions to justify reversal and the Court said:

“But yet there may be instances where such a *strong impression* has been made upon the *minds of the jury* by illegal and improper testimony, that its *subsequent withdrawal will not remove* the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error. This was stated by Mr. Justice Field in *Hopt vs. Utah*, 120 U. S. 430, 30 L. Ed. 708, 7 Sup. Ct. Rep. 614. And see *Waldron vs. Waldron*, 156 U. S. 361, 383, 39 L. Ed. 453, 459, 15 Sup. Ct. Rep. 383.”

And, again:

“In the cases contained in Class A, it is held that declarations, either oral, or written, made by a testator, *either before or after* the date of the alleged will, unless made near enough to the time of its execution to become a part of the *res gestae*, are not admissible as evidence in favor of or against the validity of the will.”

* * * * *

“After much reflection upon the subject, we are inclined to the opinion that not only is the *weight of authority* with the cases which *exclude* the *evidence both before and after* the *execution*, but the *principles upon which our law of evidence is founded necessitates that exclusion*. The declarations are purely hearsay, being merely unsworn declarations, and when no part of the *res gestae* are not within any of the recognized exceptions admitting evidence of that kind.”

This last paragraph was quoted and followed in *Kultz vs. Jaeger*, 29 App. D. C. 300, where the Court held upon review of the testimony in a contest involving the validity of a will by which the testatrix *left her entire estate to her husband*, showing repeated quarrels between the couple, and instances of ill treatment of the wife by the husband for some years prior to the making of the will, *but not negating forgiveness by her, and also showing anxiety on his part that she should make such a will, and that he went for the person who prepared it and for another who witnessed it, but not showing that he urged his wife to make it, or that she yielded to any importunity on his part, or that he was present when it was executed*,—the action of the trial court in directing a verdict for the caveatees on the issue of undue influence, it having been conceded that the testatrix was of sound mind, was *held not to be error, on the ground*

that the evidence did no more than to raise a suspicion of undue influence.

It was also held where the disputed issue in a will contest is as to whether undue influence was exercised on the testatrix, that evidence of her declarations, both before and after the execution of the will, as to her testamentary intentions and *concerning her relations with the beneficiary* under the will and her next of kin, are inadmissible, when not a part of the *res gestae*.

The Court stated:

“In our opinion the court carefully followed the rule in *Throckmorton vs. Holt*, 180 U. S. 552, 45 L Ed. 663, 21 Sup. Ct. Rep. 474. In that case the issues were forgery and revocation. *In this* the issues were the *execution* of the will, mental capacity, and undue influence; but the execution of the will was *undisputed*, and the *mental capacity* of the testatrix was clearly shown by the caveator’s testimony.”

The Court then quoted from *Throckmorton vs. Holt* and then said:

“*But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations as indicative of the state of his affections are no more admissible than would be his unsworn declarations as to any other fact.*”

This makes inadmissible the New York letter, power of attorney, and Mrs. Monaco’s testimony as to deceased’s feelings for the children. Evidence as to power of attorney was purely for the purpose of, and tended toward, proving fraud. As all fraud issues were withdrawn, such evidence was improper and besides it prejudiced the jury. It was also offered for purpose of prejudicing the jury.

III.

WHERE ALL THE GROUNDS OF THE CAVEAT ARE DENIED BY COURT ON MOTION OR WITHDRAWN AND A FURTHER UNPLEADED ISSUE IS FRAMED AND SUBMITTED ON UN-DUE INFLUENCE WITHOUT ANY ELEMENT OF FRAUD OR COERCION AND THE JURY FINDS FOR THE CAVEATOR ON THAT ISSUE IT IS THE DUTY OF THE COURT TO ENTER JUDGMENT FOR THE CAVEATEE AND ADMIT THE WILL TO PROBATE NOTWITHSTANDING THE VERDICT.

It would seem under the principles enunciated in *Smith vs. P. B. & W. R. R. Co.*, 46 Apps. D. C. 275; 45 W. L. R. 258, that the caveatee is entitled to a judgment sustaining the will notwithstanding the verdict.

Anyway, she is entitled to have the judgment on the verdict arrested and to have a judgment probating the will under the principles laid down in *Slocum vs. New York L. Ins. Company*, 228 U. S., at 381; 57 L. Ed., at 887, as follows:

“We do not overlook the fact that at common law there were two well-recognized instances in which the verdict could be disregarded and the case disposed of without a new trial. One was where the defendant’s plea confessed the plaintiff’s cause of action and set up matter in avoidance which, even if true, was insufficient in law to constitute a bar or defense; and the other was where the plaintiff’s pleading, even if its allegations were true, disclosed no right of recovery. If in either instance a verdict was taken, the court nevertheless could make such disposition of the case as was required by the state of the pleadings, and this because the issues settled by the verdict were wholly immaterial. In the first instance the court’s action was invoked by a motion for judgment *non obstante veredicto*, and in the latter by a motion to arrest judgment on the verdict. Thus, we find it said in *Smith’s Action* at

Law, 12th Ed., p. 147, a recognized authority on common law procedure: 'A motion for judgment *non obstante veredicto* is one which is only made by a plaintiff. * * * It is given when, upon an examination of the whole pleadings, it appears to the court that the defendant has admitted himself to be in the wrong, and has taken issue on some point which, though decided in his favor by the jury, still does not at all better his case. A motion in arrest of judgment is the exact reverse of that for judgment *non obstante veredicto*. The applicant in the one case insists that the plaintiff is entitled to the judgment of the court, although a verdict has been delivered in his favor. Like a motion for judgment *non obstante veredicto*, that in arrest of judgment must always be grounded upon something apparent on the face of the pleadings.' To the same effect are 1 Chitty, Pl. 687; Stephen Pl. 96-98; *Rand vs.* (382 Vaughan), 1 Bing. N. C. 767, 1 Scott, 670, 1 Hodges 173, 4 L. J. C. P. N. S. 239; *Pim vs. Grazebrook*, 2 C. B. 429, 444; *Schermerhorn vs. Schermerhorn*, 5 Wend. 513; *Bellows vs. Shannon*, 2 Hill, 86; *McFerran vs. McFerran*, 69 Ind. 29, 32; *Lewis vs. Foard*, 112 N. C. 402, 17 S. E. 9; *Manning vs. Orleans*, 42 Neb. 712, 60 N. W. 953; *McCoy vs. Jones*, 61 Ohio St. 119, 129, 55 N. E. 219. In *Bond vs. Dustin*, 112 U. S. 604, 608, 28 L. Ed. 835, 836, 5 Sup. Ct. Rep. 296, and *Van Stone vs. Stillwell & B. Mfg. Co.*, 142 U. S. 128, 135, 35 L. Ed. 961, 963, 12 Sup. Ct. Rep. 181, this court, recognizing that this was the extent of the common law practice, held that a motion in arrest of judgment could not be sustained for an insufficiency in the evidence, but only for a defect apparent on the face of the record proper. Thus, it will be perceived that the rules of the common law, permitting a judgment *non obstante veredicto* and the arrest of judgment on a verdict, did not embrace cases like the present, but only those in which the pleadings presented no material issue requiring a trial or verdict."

It is stated with many citations in 33 C. J. 1181 as follows:

WHEN RENDERED FOR PLAINTIFF.

“Plaintiff is entitled to a judgment *non obstante veredicto* where the issue determined for defendant is immaterial, provided the case is not one calling for a repleader, and where the plea or answer sets up facts insufficient in law to constitute a defense, or where upon the whole record it appears that the right of the case is with plaintiff.”

* * * * *

“Defendant is entitled to a judgment *non obstante veredicto* where plaintiff’s pleadings are insufficient to support a judgment in his favor, as where the declaration states no cause of action.”

The fourth issue was not pleaded but if it had been pleaded the pleading would not constitute a cause of action and as all the issues based on pleadings that alleged a cause of action were either withdrawn or denied by the Court as a matter of law then under the above citations the appellant is entitled to a judgment notwithstanding the verdict and to have the will probated.

In *National, etc., Co. vs. Sweeney*, 3 App. D. C. 401, it is held that it is improper to frame any issue where there is no foundation for same in allegations of the caveat.

IV.

REMAINING ASSIGNMENTS OF ERROR.

All of the other assignments of error and exceptions in the record are relied on though not discussed particularly.

Proof of gifts or bequests to a housekeeper does not establish undue influence sufficient to vacate a will or deed and there is not a confidential relation between the two or between the deceased and the head of the house where he makes his home though on intimate relations and doing business with her. Hood on Wills, Paragraph 191, page 120; *Richardson vs. Bly*, 181 Mass. 97, 63 N. E. 3; *Menner vs. Elliott*, 184 Pa. State 41, 49 Atl. 46.

When the Court announced before the jury at the close of the caveator's testimony that the questions of fraud were withdrawn and witnesses to testify to deny the fraud were released and then in the charge the Court again reiterated that the issues of fraud and mental incapacity were directed against the caveator or withdrawn it was prejudicial to the appellant and tended to confuse and necessarily must have confused, the jury when the Court went on to discuss what was coercion and fraud, as the Court did in its charge; this necessarily made the jury believe that it should consider the testimony of the appellee introduced for the purpose of endeavoring to establish fraud but which the Court held and the caveator admitted did not establish fraud.

All of this was urged on the Court in the motion for a new trial and for a judgment notwithstanding the verdict and in arrest of judgment and the Court should have granted a judgment in favor of the appellant notwithstanding the verdict and admitted the will to probate or should have arrested the judgment on the verdict on the caveat as the fourth issue was not pleaded, and entered judgment admitting the will to probate or to overcome this confusion of the jury to have granted a new trial.

If a will could be vacated on the testimony in this case then no man legally separated from his wife, and his children grown, can ever make a will giving some property to a friend or housekeeper or benefactor.

CONCLUSION.

Taking the whole record in consideration it seems that it is the duty of this Court to reverse the judgment and to remand the cause with instructions to enter a judgment for the appellant here, caveator below, notwithstanding the verdict and to admit the will to probate, with costs.

Respectfully submitted,

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Washington, D. C., March 1, 1935.

FILED MAR 26 1935

IN THE
**United States Court of Appeals
for the District of Columbia**

APRIL TERM. 1935

No. 6367.

KATHERINE R. SIMPKINS, *Appellant*,

v.

JAMES H. McDERMOTT, *Appellee*.

BRIEF UPON BEHALF OF APPELLEE.

V. O. HILL,
Southern Building,
Attorney for Appellee.

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Statement.

The facts in this case are not deemed to have been sufficiently stated by appellant to enable a proper discussion of the questions involved, and having this in mind, the case may be stated somewhat more fully, but not in every particular, as follows:

Deceased married June 26, 1901, and left surviving his widow and five children, all of age except a minor son who lived with his mother at 1344 G Street S. E. He was a retired policeman, and did other work, for which he received an income of \$283.50 until he lost his position and his pension was cut, then he received \$158.50 per month, which may have been further reduced to \$130.00 per month just shortly after he died.

He got along with his family all right until he met and began to associate with caveatee, thereafter he became indifferent to the children, would not eat at home, staying out until midnight and sometimes all night. His association with caveatee began at 604 5th Street, N. W., in 1918, from where caveatee called him up on the phone at his residence. He took his meals with caveatee and usually left her house at 11 P. M. She did his laundry. When he was at her house no one else could get in.

Upon one occasion before deceased and his wife separated, he bought an automobile to take caveatee, himself and her son to Canada on a trip (R. 23).

Upon another occasion while she lived at 604 5th Street, N. W., she asked deceased to bring her a compact and a half pound box of candy, which he did, about which caveatee said, "See, I am as popular as — young girl."

Also while living at the same address caveatee's mother was there on a visit and became ill, and caveatee could not see deceased, about which she remarked that she was glad to get a chance to turn him down; that it made a better impression (R. 24).

In March, 1927, he entered into a separation agreement with his wife under which he was to pay her \$75.00 per month, she to live in their home, make building and loan payments thereon, pay taxes, repairs,

etc., wherein the home was referred to as "belonging jointly to the parties hereto." After separation agreement he went to live with caveatee at various places and finally at 1420 R Street, N. W., and Shady Side, Maryland. He kept the members of his family in ignorance of his movements and whereabouts with exception of a daughter, Mrs. Burnadette Monaco, through whom he kept informed about the other members of the family.

About November 12, 1927, deceased sent a letter to a Mr. Elliott, enclosing money to be by him forwarded to deceased's wife, asking his friend to mail it to her, in which letter he gave his address in New York as, "Mrs. K. Simpkins, 2013 5th Ave., Section B, Apt. 14," which letter was inadvertently sent to the wife by Mr. Elliott (R. 21).

In March, 1928, deceased and caveatee purchased an automobile in their joint names (R. 41).

During about March, 1931, while deceased and caveatee were living together in an apartment at 1420 R Street, N. W., they would go out automobile riding together, and upon one occasion when they were about to go out for a ride in the automobile, deceased objected to taking the dog along and requested the janitor to keep caveatee's dog until they returned, but she objected and argued with him, and had her way, taking the dog along with them. And upon another occasion while they were living at this same address they quarreled, and talked unusually loud, after which deceased went out by himself (R. 31).

Payments under separation agreement dwindled from \$75.00 per month to less than \$20.00, and stopped entirely in July, 1933, after deceased's affairs had been placed in the hands of Mr. Marshall, an attorney who had previously represented caveatee for several years, and who was introduced to deceased by caveatee.

During October, 1932, deceased went to Reno, Nevada, for which he borrowed \$175.00 from his daughter, Mrs. Monaco, but which he never repaid, although she wrote him asking that even small monthly installments thereon be paid. As an answer to her request, caveatee testified:

“I *told* him to tell Burnadette that I would let her have my piano in satisfaction of the \$175.00 she had loaned her father to go to Reno” (R. 38).

While at Reno deceased was taken ill and had to return here where he was met at the train by caveatee on November 20, 1932, who took him to their 1420 R Street apartment, put him to bed and called a doctor next morning. Doctor said he was a very sick man. Keep him quiet. Doctor sent a trained nurse on the 21st and she remained until the next day. Deceased wanted to go to hospital, and doctor said he would be better off there, then caveatee said (on cross-examination):

“I said to Dr. Huffman on the morning of the 21st, ‘Mac wanted to see his lawyer’ ”

and caveatee called Mr. Marshall, who came down at noon. The next time she saw Mr. Marshall he had two men with him, and that was on *November 22nd*, and after they had gone, deceased told her he had made a will (R. 40, 41).

On direct examination caveatee testified that on *November 22*, 1932, deceased asked her to phone Mr. Marshall to come up, and when Mr. Marshall left deceased stated he had made a will.

Mr. Marshall testified that on November 21, 1932, the *deceased* phoned him to come up about a will and

he immediately went, secured the data, and on account of other engagements that afternoon got Mr. Hudson to draw the will; that he did not see trained nurse on that occasion, nor the doctor. That his office is at Vermont Ave. N. W. and L Street, and Mr. Hudson's office at 14th and H Streets, N. W. (R. 43).

The will in question was dated *November 23, 1932*, and left everything to caveatee, cutting off all the others possible under the law.

About December 5, 1932, deceased had just come down from clinic or operating room, was in a coma and did not know his daughter, Mrs. Monaco. Caveatee was in his room, with a Notary Public and a Red Cross nurse and had deceased sign a paper which she had previously had Mr. Marshall prepare, which she stated was to permit her to sign deceased checks. His signature on the paper was so bad Notary would not acknowledge it, so they waited several minutes until he came to and signed again, after erasing the first signature. The paper was a power of attorney for caveatee to sign checks, endorse notes, drafts, etc., for deceased. Caveatee testified Mr. Marshall was present when this power of attorney was executed, and he testified to the same effect, but Mrs. Monaco contradicted them (R. 48), as did the Notary Public who took the acknowledgment (R. 47).

Deceased was a member of the Metropolitan Police Relief Association, and his daughter, Mrs. Monaco, had paid some of his dues in it to keep it alive. He designated her as beneficiary in 1931 to receive the benefits in the event of his death. In October, 1933, Mrs. Monaco had heard the association was bankrupt, and gave the papers back to deceased to look into the matter of bankruptcy, and instead of doing that, he and caveatee went to the office of the association where the

designation was changed from his daughter to caveatee, and before he signed the paper making the change to caveatee, he handed it to her and asked her if it suited her or was all right and she read it and said "yes," whereupon he executed it. Caveatee denied this, but was contradicted by Howard E. Crawford, who was present at the time of the occurrence (R. 48). The change from deceased's daughter of these benefits to caveatee was October 19, 1933.

Deceased died at Shady Side, Maryland, on November 8th, 1933, stricken while riding in automobile with caveatee.

Argument.

At the time of the execution of the will in this case, testator was a very sick man. He executed an unnatural will, preferring caveatee to others having greater claims upon his bounty. She acted as his companion on trips, social calls, housekeeper, nurse and partner in the purchase of an automobile; lived with him alone at various addresses, and endeavored to make him jealous by refusing him dates before he had left his wife and family. Her own testimony shows she domineered him, and especially about the piano, when she said, "I told him to tell Buradette, etc." He associated with caveatee very closely from 1918 to the date of the will, November 23, 1932, but held off making a will in favor of her for 14 years and only gave in when he was helpless in bed under the care of a doctor and caveatee, who procured an attorney to draw the will, and exercised general control over his affairs. There was substantial evidence from which the jury might well have decided testator and caveatee had lived in illegal sexual relations; indeed, that conclusion is a

natural one. Clearly these matters should have been submitted to the jury, and there is ample evidence to sustain their verdict in this case.

Undue Influence.

Undue influence is defined by *Borland* on Wills, at page 252, as follows:

“It is a refined and subtle species of fraud, savoring sometimes of deceit, sometimes of coercion, but not necessarily including either, whereby the mind and will of the testator are supplanted by that of another for some sinister purpose connected with the disposition of his property.”

There is no yardstick by which undue influence can be accurately measured to apply in every case, but rather each case must be determined upon its individual facts and circumstances.

In *Hagerty v. Olmstead*, 39 Appls. D. C. 171, the Court said, quoting with approval from a Kentucky case:

“Incapacity opens the door to undue influence, and when opportunities for such influence are shown, and the favored devisees are the beneficiaries of a will unnatural in its provisions, to the exclusion of others having equal claims at least upon his bounty, very slight circumstances are sufficient to make the question of undue influence one for the jury.

“* * * it is not necessary that there be direct proof of fraud or undue influence. It is competent for the court to submit to the jury all the circumstances concerning the execution of the will; and when it appears that confidential relations existed, as in this case, between the testatrix and the principal beneficiary under the will, it is for the jury to

infer from all the evidence before it whether or not the execution of the will was the result of improper inducement or fraud. We think the admitted transactions of the executor and chief beneficiary in connection with the execution of this will were sufficient to raise a presumption of undue influence, and cast upon him the duty of rebutting it by showing that the will was made as the free and voluntary act of the testatrix. The law is well settled in such a case. 'General evidence of power exercised over the testator, especially if he be of comparatively weak mind from age or bodily infirmity, though not to such an extent as to destroy testamentary capacity, will be enough to raise a presumption, which ought to be met and overcome before such a will can be established. Particularly ought this to be the rule when the party to be benefitted stands in a confidential relation to the testator.' 'Where the party,' says Mr. Redfield, 'to be benefitted by the will has a controlling agency in procuring its formal execution, it is universally regarded as a very suspicious circumstance, and one requiring the fullest explanation.' * * *"

In *Towson v. Moore*, 11 Appls. D. C. 381, the Court held:

"The burden of proving undue influence is on the party alleging it unless it appears that the other party had derived advantage from confidential or beneficiary relations with the testator such as to make it incumbent on him to show the fairness of the transaction."

This caveat did not do.

In *Barbour v. Moore*, 4 Appls. D. C. 550, it was held:

"Any degree of importunity or undue influence which deprives the testator of his free agency, and which is such as he is too weak to resist and

in effect renders the instrument not his free and unconstrained act, is sufficient to and will invalidate a will."

In *Conley v. Nailor*, 118 U. S. 136, the Court said:

"When a will or deed is made while the parties are living in illegal sexual relations, it is open to suspicion of fraud and undue influence."

And in *Stant v. A. S. & T. Co.*, 23 Appls. D. C. 29, it was said:

"* * * that the influence which may be supposed to have arisen from the existence of illicit relations, if such relations could be shown to have existed up to the time of her death, might be assumed to continue to operate at the date of the making of the will."

Admissibility of Evidence.

The objection of appellant to evidence admitted in this case not a part of the *res gestae* is not well founded, but applies only to declarations of a testator, and then not in a case where mental incapacity and undue influence are in issue. The case of *Throckmorton v. Holt*, 180 U. S. 552, cited by appellant, so holds on page 572. See also *Barbour v. Moore*, 4 Appls. D. C. 535, and *Towson v. Moore*, 11 Appls. D. C. 377.

Evidence of undue influence both prior and subsequent to the execution of a will is competent, quoting from *Page on Wills*, Vol. 1 (2nd Ed.), p. 1214, as follows:

"Evidence which tends to show the beneficiary acquired control over testator's mind before the will was made, and retained such control beyond the period at which the will was executed is admissible."

In Re Lorees Estate, 158 Mich. 372.

“Even if such evidence relates to a remote period of time.”

In Re Higgins Estate, 156 Cal. 257.

Hutchins v. Hutchins, 135 Md. 401.

“If evidence has been offered tending to show undue influence before the execution of the will, evidence is admissible to show a continuance of such influence after the execution.”

In Re Vhays Estate, 225 Mich. 107.

In Re Miller's Estate, 31 Utah 415.

In *Pillow v. Shield*, 46 Appls. D. C. 494, it was held:

“Admission of a letter written by testator to caveator five years before the will in question is not reversible error where all parties thereafter testify to every material statement in the letter. It is not too remote, the question of remoteness is to be measured in terms of causation and relation to the issue, rather than in terms of time.”

Also, the Court has some discretion in admitting such evidence. See *Olmstead v. Webb*, 5 Appls. D. C. 49, 50.

Thus admitting the so-called New York letter of testator was not error. It tended to show illegal sexual relations between caveatee and himself, and after its admission without objection, caveatee thereafter herself testified to the same effect (R. 36).

Upon the same basis, in addition to other reasons, the admission of the power of attorney incident was not error, for thereafter caveatee herself testified to the same effect (R. 37).

Likewise, caveatee herself testified to many declarations of deceased throughout her entire testimony.

**Caveatee Occupied a Position of Confidence and Trust
With Regard to Testator.**

Quoting from *Page on Wills*, Vol. 1 (2nd Ed.), page 1259:

“The physician and nurse of testator stand in a relation of peculiar trust and confidence to the testator when the will is made in his last sickness. Accordingly devisees and bequests in favor of a physician or nurse have been held by the courts to be subject to suspicion, and it has even been said that a presumption of fact arises of undue influence.”

Seavey v. Glass, 315 Ill. 611. (Beneficiary was nurse and housekeeper and had will prepared by her own attorney.)

Pleading Undue Influence.

The object of pleading is to bring the litigants to an issue. In this case it is clear the parties knew the issues to be tried, and that they contained the issue of undue influence cannot be doubted, as evidenced by caveatee's answer to paragraph 3 of the caveat, wherein she denied the will was executed under “the undue influence of Katherine R. Simpkins” (R. 5). The issues framed in this case, to which caveatee through her attorney of record agreed, include that of undue influence in terms not greatly dissimilar to those set out in *Frietag v. Freitag*, 47 Appls. D. C. 1, on undue influence, which this Court did not condemn as being an improper pleading, but held there was no evidence to support it.

Record.

The details of the motions set out on page 5 of caveatee's brief are not required in the record under Rule IV (d) of this Court. ~~The record does, however, contain~~

Conclusion.

There is ample evidence to support the allegation of undue influence. The Court's instructions were as fair to caveatee as that evidence justified. The evidence shows clearly that caveatee had testator in hand and did with him what SHE wanted done.

The most favorable view that can be taken of the case upon behalf of the caveatee is that she should have come in and affirmatively established the fairness of the execution of the will, which she did not do. But, on the contrary, her testimony was evasive, contradictory, and was contradicted by other disinterested witnesses. The decision of the lower court should be sustained.

Respectfully submitted,

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